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IN THE

# Supreme Court of the United States

**October Term, 1980**

No.

REXALL DRUG COMPANY and
ELI LILLY AND COMPANY,

*Petitioners,*

vs.

JUDITH SINDELL, *et al.*,

*Respondents.*

REXALL DRUG COMPANY,

*Petitioner,*

vs.

MAUREEN ROGERS, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The petitioners Rexall Drug Company ("Rexall") and Eli Lilly and Company ("Lilly") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in these proceedings on March 20, 1980.

### QUESTIONS PRESENTED

1. Whether due process of law or equal protection of the laws is violated where plaintiffs who cannot prove which manufacturer's product allegedly caused their injury are permitted to recover from a random selection of all manufacturers making a similar product?

2. Whether due process of law and equal protection of the laws are violated by a state court decision which precludes a class of defendants from the right to a fair hearing on the question of whether any of the defendants manufactured the alleged injury-causing product?

3. Whether the commerce or supremacy clauses are violated by state action which frustrates, impedes and erodes federal policies encouraging the manufacturing and distribution of generic drugs?

## PARTIES TO THE PROCEEDINGS BELOW

Defendants and respondents in *Judith Sindell v. Abbott Laboratories, et al.* were Abbott Laboratories, Lilly, E. R. Squibb & Sons, Inc., The Upjohn Company and Rexall. In *Maureen Rogers v. Rexall Drug Company, et al.*, defendants and respondents were E. R. Squibb & Sons, Inc., The Upjohn Company and Rexall.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Constitutional Provisions Involved | 1 |
| Statement of the Case | 2 |
| a. Introduction | 2 |
| b. The DES Controversy | 3 |
| c. Prior Raising of Federal Issues | 7 |
| Reasons for Granting the Writ | 7 |
| 1. The Jurisdiction of This Court Is Properly Invoked. | 7 |
| 2. The Judgment Below Violates Procedural Due Process and Denies Equal Protection of the Laws by Creating Irrational, Unworkable and Unfair Procedural Devices to Do Away With Proof of Causation Linking A Defendant to the Product Allegedly Causing Injury. | 9 |
| 3. The Judgment Below Is Preempted by the Supremacy Clause Because It Frustrates Federal Policy Governing the Development and Marketing of Prescription Drugs, and In Particular the Marketing of Drugs on a Generic Basis, and Creates an Invalid Burden on Interstate Commerce | 21 |
| Conclusion | 26 |

Appendix A. Opinion of the Supreme Court of the State of California

Appendix B. Eli Lilly and Company's Petition for Rehearing to the Supreme Court of the State of California

Appendix C. Rexall Drug Company's Joinder in Eli Lilly and Company's Petition for Rehearing to the Supreme Court of the State of California

Appendix D. Order of the Supreme Court of the State of California Denying Rehearing

# TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

PAGE

***Cases***

*Abel v. Eli Lilly and Co.*, Action No. 74-030-070NP Filed in the Wayne County Circuit Court, Detroit, Michigan, appeal pending to the Supreme Court of Michigan ..... 13

*American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899 (1978) ..... 12

*American Railway Exp. Co. v. Kentucky*, 273 U.S. 269 (1927) ..... 20

*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ..... 20

*Baker v. Coca Cola Bottling Works of Gary*, 132 Ind. App. 390, 177 N.E. 2d 759 (1961) ..... 10

*Bell v. Burson*, 402 U.S. 535 (1971) ..... 20

*Judy K. Benny v. Abbott Laboratories, et al.*, Alameda Superior Court Case No. 525322-5 ..... 19

*Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) 24

*Brinkerhoff-Farris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1929) ..... 7

*Cindy Bocian v. Abbott Laboratories, et al.*, San Francisco Superior Court Case No. 760532 ..... 19

*Carrington v. Rash*, 380 U.S. 89 (1965) ..... 18

*Connolly v. Union Service Pipe Co.*, 184 U.S. 540 (1902) 18

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) 7

*Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974) ..... 20

*Dawson Chem. Co. v. Rohm & Haas Co.*, 40 CCH S. Ct. Bull. p. B3850, B3896 (1980) ..... 23

*Diamond v. Chakrabarty*, 40 CCH S. Ct. Bull. p. B3122, B3135 (1980) ..... 22

| | PAGE |
|---|---|
| *DiSanto v. Pennsylvania*, 273 U.S. 34, 43-44 (1927) (Stone, J.) *dissenting* | 24 |
| *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978) | 9 |
| *Dunn v. Blumstein*, 405 U.S. 330, 349-352 (1971) | 18 |
| *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959) | 24 |
| *Ford Motor Co. v. United States*, 405 U.S. 562 (1972) | 23 |
| *Giaccio v. Pennsylvania*, 382 U.S. 397, 403 (1966) | 9 |
| *Goldberg v. Kelly*, 397 U.S. 254 (1970) | 20 |
| *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976) | 25 |
| *Great A. & P. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154 (1950) *(Concurring Opinion)* | 22 |
| *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935) | 7 |
| *Hettinger v. Glass Specialty Co.*, 59 F.R.D. 286, 294 (N.D. Ill. 1973) | 19 |
| *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) | 18 |
| *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, *cert. denied*, 82 N.J. 267 (1969) | 3 |
| *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) | 24 |
| *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 89, 150 Cal. Rptr. 730 (1978) | 3 |
| *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963) | 8 |
| *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) | 20 |
| *NAACP v. Alabama*, 377 U.S. 288, 380 (1964) | 20 |
| *Perez v. Campbell*, 402 U.S. 637, 652 (1971) | 24 |
| *Picker X-Ray Corp. v. Frerker*, 405 F.2d 916 (8th Cir. 1969) | 10 |
| *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) | 25 |
| *Prudential Ins. Co. v. Cheeck*, 359 U.S. 530 (1922) | 20 |

PAGE

*Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978) ..... 24

*Reed v. Reed*, 404 U.S. 71 (1971) ..... 18

*Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873) 9

*Reiter v. Sonotone Corp.*, 579 F.2d 1077, 1086 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979) ..... 23

*Rekasie v. Bucyrus-Erie Co.*, 262 F.2d 804 (3d Cir. 1959) 10

*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) ..... 24

*Saunders v. Shaw*, 244 U.S. 317 (1917) ..... 20

*Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) 21

*Shapiro v. Thompson*, 394 U.S. 618 (1969) ..... 18

*Smith v. Cahoon*, 283 U.S. 553 (1931) ..... 18

*Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1943) 24

*Stanley* v. *Illinois*, 405 U.S. 645, 648, 656 (1972) ..... 18, 20

*Thompson-Hayward Chemical Co.* v. *Childress*, 277 Ala. 285,169 So.2d 305 (1964) ..... 10

*Carol Trevallee* v. *Abbott Laboratories, et al.*, San Francisco Superior Court Case No. 721204 ..... 19

*Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973) ..... 20

*Weinberger* v. *Hynson, Wescott & Dunning*, 412 U.S. 609, 612-614, 37 L.Ed2d 207 (1973) ..... 4

*Wetzel* v. *Eaton Corp.*, 62 F.R.D. 22, 28 (D. Minn. 1973) 10

*Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974) ..... 9

***Constitutional Provisions***

Constitution of the United States, Article I, Section 89, Clause 3 ..... 1

Constitution of the United States, Article VI, Clause 2 1

Constitution of the United States, Fourteenth Amendment, Section 1 ..... 1

PAGE

***Statutes***

California Businesses and Professions Code, Section 4047.6 ..... 21

California Welfare and Institutions Code, Sections 14000, *et seq.*, and Sections 11152 and 11153.7 ..... 17

15 U.S.C. § 13, *et seq.* ..... 24

21 U.S.C. § 301, *et seq.* ..... 23

21 U.S.C. § 321 (p)(1) ..... 4

21 U.S.C. § 351(b) ..... 5

21 U.S.C. § 352(e) ..... 5

21 U.S.C. § 355(a) ..... 4

28 U.S.C. § 1257(3) ..... 1, 7

***Other Authorities***

*Brand Names and Generic Drugs,* 1974, Hearings Before Subcommittee on Labor and Public Welfare, 93d Congress 2d Sess. (July 22, 1974) ..... 21

Coggins, *Industry-Wide Liability,* 13 Suffolk L. Rev. 980, 1003-1006 (1979) ..... 15, 23

Commerce Department, *Interagency Task Force on Product Liability: Final Report of the Insurance Study,* Volume 1 at 2-4, 2-5 (January 1977) ..... 15, 16

Grabowski, *Drug Regulation and Innovation: Empirical Evidence and Policy Options* (1976) ..... 23

*Hearings Before the Subcommittee on Health of the Committee on Labor and Public Welfare,* 94th Congress, p. 119 (September 23, 1977) ..... 23

Herbst, Cole, Colton, Robboy and Scully, *Age-Incidence and Risk of Diethylstilbestrol-Related Clear Cell Adenocarcinoma of the Vagina and Cervix,* 128 Am. J. Obst. Gyn. 43 (1977) ..... 5

PAGE

Herbst, Cole, Norusis, Welch and Scully, *Epidemiologic Aspects and Factors Related to Survival in 384 Registry Cases of Clear Cell Adenocarcinoma of the Vagina and Cervix,* 135 Am. J. Obstet. Gynecol. 876 (1979) 5

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1 Hursh & Bailey, *American Law of Products Liability 2d,* Section 1:41 (1974) ..... 10

Kinsley, *Fate and Lawsuits,* 182 The New Republic, 20, 21 (June 14, 1980) ..... 16

*Maximum Allowable Costs for Drugs,* Office of the Secretary, Department of Health, Education and Welfare (July 25, 1976) ..... 22

Peltzman, *Regulation of Pharmaceutical Innovation; The 1962 Amendments 1-3* (1974) ..... 23

Annotation, *Products Liability: Necessity & Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury,* 51 A.L.R.3d 1344, 1349 (1973) ..... 10

Prosser, *Handbook of the Law of Torts,* 661 (4th Ed. 1971) ..... 22

Prosser, *Res Ipsa Loquitur, a Reply to Professor Carpenter,* 10 So. Calif. L. Rev. 459, 464 (1937) ..... 13

Prosser, *The Law of Torts, § 41 at 236 (4th Ed. 1971)* *10*

*Schwartzman, The Expected Return from Pharmaceutical Reserach,* 1-3 (1975) ..... 22

George & Olive Smith, *Prophylactic Hormone Therapy Relation to Complications of Pregnacy,* 4 Obst. & Gyn. 129 (1954) ..... 4

Olive Smith, *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy,* 56 Am. J. Obst. & Gyn. 821 (1948) ..... 4

*Source Book of Health Insurance Data,* 1976-77, p. 21 .. 16

White, P., *Pregnancy Complicating Diabetes,* J.A.M.A. 128, 181 (1945) ..... 4

PAGE

White, P., *Pregnancy Complicating Diabetes,* Amer. J. Med. 7, 609 (1949) ..... 4

White, P., *Pregnancy Complicating Diabetes, The Treatment of Diabetes Mellitus,* 9th Edition, Philadelphia, Lea & Febiger (1952) ..... 4

## OPINIONS BELOW

The opinion of the Supreme Court of the State of California, 26 Cal. 3d 588, 607 P.2d 924 (1980), is set forth in Appendix A hereto.

## JURISDICTION

The judgment of the Supreme Court of the State of California was entered on March 20, 1980. Timely petitions for rehearing were denied on May 7, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3:

> "[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance Thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

Constitution of the United States, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

### a. Introduction

The California Supreme Court has imposed liability upon manufacturers of products who caused plaintiffs no injury. That Court has adopted what it itself concedes to be a novel and revolutionary theory of common law product liability in tort not raised by any party in any pleading, brief or argument at any stage of the litigation.

The Court acknowledges that its new theory of liability finds no basis in, and indeed is contrary to, precedent from its own jurisdiction or any other common law jurisdiction. The Court holds that, in product liability actions involving thousands of claimants who bring suit against only a few of the more than 200 manufacturers making an identical and fungible product, those claimants need not establish the identity of the specific manufacturer whose product allegedly caused the injury. Indeed, the Court rules that a plaintiff need only join a sufficient, albeit quantitatively insignificant, number of such manufacturers so that in the aggregate they comprise a "substantial share" of the market for the product. Then plaintiff may recover, says the Court, against the group of defendants singled out for suit even though the injury may have been, and probably was, caused by a product they did not make and even though the group selected may represent less than 50% of the market.

Thus, the judgment exposes each manufacturer offering identical and fungible products in a multi-source market to a random and potentially devastating liability for injuries it did not cause and over which it has absolutely no control. The judgment will erect major barriers to generic product marketing, to product research and development and to the freedom of market entry, and it will diminish the availability and increase the price of essential products flowing in interstate commerce – all in violation of federal policies designed to encourage such results.

*Sindell* and *Rogers* are both products liability suits by women alleging injuries to their genital tracts as a result of *in utero* exposure over 20 years ago to diethylstilbestrol ("DES"), a synthetic estrogen prescribed to their mothers to prevent miscarriage or spontaneous abortion. Sindell alleges that she is unable to identify which manufacturer of DES produced the drug taken by her mother; Rogers

alleges that Lilly manufacturered the drug taken by her mother. Plaintiffs seek to impose strict liability in tort against a total of five defendants, including Rexall and Lilly, out of over 200 pharmaceutical companies which manufactured DES for sale in the United States. (App. A, p. 21).

**b. The DES Controversy***

Estrogen is a hormone produced naturally by the female human body. It is vital for sexual development and fertility, plays a significant role during pregnancy, and has other functions, some of which are still not fully understood by medical science. After estrogens were isolated in the 1920s, numerous investigations were conducted to discover their effects and functions. One of the most prominent series of studies was conducted by Dr. George Smith, who taught gynecology at the Harvard Medical School and later became head of that department.

Dr. Smith's early hormone research in the 1930s indicated that premature pregnancy terminations were associated with low progesterone levels, a condition which could be improved by the administration of estrogen. His research was hampered, however, because natural estrogen was difficult to administer and prohibitively expensive. Thus, when the synthetic estrogen called Diethylstilbestrol (DES) was created in 1938 by the English doctor E. C. Dodds, scientists who were conducting research with estrogens believed a significant medical advance had been made. DES could be administered orally, was inexpensive and duplicated the action of natural estrogen.

DES was not, however, immediately sold for use in treating accidents of pregnancy. FDA approval for that use

* The *Sindell* opinion quotes extensively from the unproven and disputed allegations of the complaint. *See, for example,* the factual discussions in the dissenting opinion of the Court below and in *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, *cert. denied*, 82 N.J. 267 (1969), *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 89, 150 Cal. Rptr. 730 (1978).

would not come until 1947, following nine years of further research and testing.*

Dr. Smith's clinical trials with DES in high risk pregnancies included 117 doctors in 48 cities. He concluded that untreated high-risk pregnancies ran twice the risk of mishap as those treated with DES.** This research was entirely independent of any pharmaceutical manufacturer.

By 1952, DES was considered to be so safe that the FDA declared that it was no longer a "new drug" within the meaning of 21 U.S.C. Section 355(a). (CT 205)*** This classification allowed any manufacturer to market that drug without performing additional testing or submitting additional data to the FDA on the drug's safety, thus avoiding all research and development costs. (CT 205) Thereafter, at least 191 companies produced DES. (CT 206)

In 1971, following 30 years of use of DES for various purposes, medical studies suggested for the first time that there might be a statistical correlation between the use of

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* Indeed, DES was not sold for any purpose in this country until 1941, after the FDA had independently conducted an exhaustive investigation of the drug's safety. (CT 204-205) The designation "CT" refers to the Clarks transcript of the record in *Sindell* in the court below.

** For a recapitulation of Dr. Smith's work, see George and Olive Smith, *Prophylactic Hormone Therapy Relation to Complications of Pregnancy*, 4 Obst. & Gyn. 129 (1954), and Olive Smith, *Diethylstilbestrol In The Prevention and Treatment of Complications of Pregnancy*, 56 Am. J. Obst. & Gyn. 821 (1948). Dr. Smith's results were duplicated by Dr. Priscilla White between 1938 and 1952. She found that high risk pregnancies treated with DES resulted in almost double the number of live babies as in the untreated group. Dr. White was also able to examine the offspring of many of these DES-treated women. She found no abnormalities like those the drug is accused of causing today. (White, P., *Pregnancy Complicating Diabetes*, J.A.M.A., 128, 181, 1945; White, P., *Pregnancy Complicating Diabetes*, Amer. J. Med. 7, 609, 1949; White, P., *Pregnancy Complicating Diabetes, The Treatment of Diabetes Mellitus*, 9th Edition, Philadelphia, Lea & Febiger, 1952.)

*** The term "NOT A NEW DRUG" means that the composition of the drug is such that it is generally recognized among experts qualified by scientific training and experience to evaluate the safety of drugs to be safe for use under the conditions prescribed. 21 U.S.C. § 321 (p)(1). See, *Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 612-614, 37 L. Ed. 2d 207 (1973).

the drug and a rare form of cancer (clear cell adenocarcinoma) in the daughters of women who had taken synthetic estrogen during pregnancy.* (CT 207) The correlation has been estimated to range between 0.14 to 1.4 per thousand daughters exposed to the product.**The cancer also occurs spontaneously in nature; its cause or causes are unknown.*** Consequently, it is not possible to attribute a specific person's injury to DES exposure. Because of these medical reports, the FDA determined in 1971 that DES should no longer be indicated for use during pregnancy although it is still used today for other purposes.

The formula for DES is a scientific constant. All manufacturers producing the drug are required to employ the same formula for DES set forth in the United States Pharmacopoeia, a standard compendium to establish the chemical identity of such products. (21 U.S.C. § 351(b)). Manufacturers are also required to employ the same description of the drug on labels or bottles containing it. (21 U.S.C. § 352(e)). DES was therefore distributed as a classic generic drug.

The delay between the time of ingestion of the drug and the time litigation is instituted has led to the threshold issue in this litigation–whether manufacturer identification should be required. Separated from consumers by at least two levels of distribution, the defendants have no means of ascertaining the identity of the manufacturer whose product was ingested by a particular person; facts pertaining to manufacturer identification rest within plaintiffs' control if available at all. The plaintiffs' mothers selected and consulted with the prescribing doctors,

* Herbst, Ulfelder and Poskanzer, *Adenocarcinoma of the Vagina*, 284 N. Eng. J. Med. 878 (1971).

** Herbst, Cole, Norusis, Welch and Scully, *Epidemiologic Aspects and Factors Related to Survival in 384 Registry Cases of Clear Cell Adenocarcinoma of the Vagina and Cervix*, 135 Am. J. Obstet. Gynecol. 876 (1979).

*** Herbst, Cole, Colton, Robboy and Scully, *Age-Incidence and Risk of Diethylstilbestrol-Related Clear Cell Adenocarcinoma of the Vagina and Cervix*, 128 Am. J. Obst. Gyn. 43 (1977).

selected the pharmacies or hospitals from which they obtained the drug, had the opportunity to observe the drug's color, size, coating, markings and other characteristics, and may have discarded the best practical evidence of identity such as pharmacy records, the container, package inserts and the drug itself.

The California Supreme Court granted petitions for hearing by Rexall, Lilly and other defendants, thereby vacating the the prior California Court of Appeal decision overruling trial court decisions that had sustained demurs to the complaints. The resulting four to three decision acknowledged that the *Sindell* complaint failed to state a cause of action based on any existing legal theory, but went on to create a new cause of action based on "market share" which obviated the need for manufacturer identification. It commented that its holding would be applicable in *Rogers* only if plaintiff failed to establish her claim that the drug taken by her mother was manufacturered by Lilly. (App. A, p. 6)

The court expressly based its decision on the belief it is more appropriate that the pharmaceutical industry, with (presumed) financial resources, should pay damages despite the lack of proof of causation than that the plaintiffs should remain without a remedy against the industry. (App. A, p. 23) Borrowing from and modifying an idea first proposed in a student comment in the Fordham Law Review,* the court held that a plaintiff who cannot identify the manufacturer of a fungible product which has caused her injury may recover the entire amount of her damages if suit is brought against manufacturers which in the aggregate produced a "substantial share" of the market. It did not define the concept of a substantial share. The court held that a defendant may overcome the artificial presumption that it caused the injury only by proving that it did not manufacture the specific product received by the

* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963 (1978) (hereinafter "Student comment").

plaintiff's mother. A defendant lacking direct proof is barred, however, from the use of relevant statistical and market share evidence to overcome the presumption. The court permitted the defendants to attempt to file third-party complaints against other manufacturers which may be subject to the court's jurisdiction, and to apportion liability among the defendants and cross-defendants based on respective market shares. (App. A, p. 25)

**c. Prior Raising of Federal Issues**

Because the theory of liability reached by the Court below was so revolutionary and completely unanticipated and was not raised or argued by any of the parties before the Court, the petitioners timely raised the constitutional objections pressed here in their petition for rehearing.* *See* Appendices B and C hereto.

## REASONS FOR GRANTING THE WRIT

### 1. THE JURISDICTION OF THIS COURT IS PROPERLY INVOKED.

The California Supreme Court judgment has finally disposed of the federal issues involved for purposes of the state litigation and is a final judgment for purposes of 28 U.S.C. § 1257.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court reviewed four categories of cases in which it has treated state decisions on federal issues as final judgments for purposes of 28 U.S.C. § 1257 notwithstanding the pendency of further state proceedings. The fourth category includes those cases in which the state decision might seriously erode Federal policies, has finally disposed of the federal issues, and when reversal on the federal issues would preclude further litigation on the relevant cause of action. *Id.* at 482-83.

* *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1929); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935).

There can be no greater erosion of Federal policies than to compel petitioners to face long, protracted complex and expensive litigation premised on an unconstitutional theory of liability. Moreover, the decision below will inhibit generic distribution of pharmaceutical products in direct contravention of strong federal policies mandating and encouraging such generic distribution. In addition, the decision will erect anti-competitive barriers to entry in the pharmaceutical industry and otherwise impede socially desirable research and development efforts to invent new, life-saving products. Because of these effects, petitioners demonstrate, *infra* page 21 *et seq.*, that California's state action is preempted by the Supremacy and Commerce clauses.

As this Court noted in *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963), immediate review is frequently desirable

> "... to determine now [whether] appellants may be tried rather than to subject them ... to long and complex litigation which may all be for naught if consideration of the [federal issue] is postponed until the conclusion of the proceedings."

This Court's immediate review of the judgment in *Sindell* and *Rogers* is essential in order to assure the fair, orderly and efficient administration of justice. Over 55 cases are pending in the federal and state courts of California where the revolutionary *Sindell* decision will in all likelihood be applied prior to resolution of the constitutional issues it involves. Those actions will all be for "naught" if, as Rexall and Lilly contend, the Constitution bars prosecution of the claims under the "market share" liability theory.

## 2. THE JUDGMENT BELOW VIOLATES PROCEDURAL DUE PROCESS BY CREATING IRRATIONAL, UNWORKABLE AND UNFAIR PROCEDURAL DEVICES TO DO AWAY WITH PROOF OF CAUSATION LINKING A DEFENDANT TO THE PRODUCT CAUSING INJURY.

The California Supreme Court judgment, by adopting a "market share" liability theory, strikes at the defendants' fundamental right to be free from a wholly arbitrary and irrational rule of liability, and their right to fair and rational rules of procedure and evidence. The judgment violates the Fourteenth Amendment's guarantee of due process* by substituting an unworkable and unreasonable quasi-legislative damage apportionment scheme for evidence of cause.

The California Supreme Court decision is best understood in its historical context.

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* Although the arguments herein are devoted to showing how the decision below runs afoul of procedural due process, there is substantial reason to believe it violates substantive due process as well. Not only did the Court below create novel and untested rules governing liability for future conduct (*cf. Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978)), but, in doing so, it abrogated fundamental common law safeguards developed to protect persons against randomized, speculative and conjectural liability on account of past conduct. This case thus falls within the category of cases where abrogation of common law rights is subject to constitutional substantive due process scrutiny. To pass muster, such action must "provide a reasonably just substitute for the common law or state tort law remedies protection it replaces" (*Id.* at 88). Because the concepts of reasonableness and fairness permeate any analysis of due process invasions, petitioners demonstrate in their discussion throughout this petition that the rules California has adopted to render an appearance of fairness are unreasonable and inequitable in the extreme and thereby violate procedural due process guarantees. But, because the predicates of those rules are also arbitrary and irrational in the extreme, they violate substantive due process guarantees as well. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). As this Court stated in *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 122 (1873), relying upon the Magna Carta and the due process clause: "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law."

Pursuant to the law of all jurisdictions in the United States, a factual chain linking the defendant with the allegedly defective product (*i.e.*, causation) is an essential element of every products liability action. *See, e.g., Picker X-Ray Corp. v. Frerker*, 405 F.2d 916 (8th Cir. 1969); *Rekasie v. Bucyrus-Erie Co.*, 262 F.2d 804 (3d Cir. 1959); *Thompson-Hayward Chemical Co. v. Childress*, 277 Ala. 285, 169 So. 2d 305 (1964); *Baker v. Coca-Cola Bottling Works of Gary*, 132 Ind. App. 390, 177 N.E.2d 759 (1961); *Wetzel v. Eaton Corp.*, 62 F.R.D. 22, 28 (D. Minn. 1973); 1 Hursh & Bailey, *American Law of Products Liability 2d*, Section 1:41 (1974); Annotation, *Products Liability: Necessity and Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury*, 51 A.L.R.3d 1344, 1349 (1973); Prosser, *The Law of Torts*, § 41 at 236 (4th ed. 1971).

The common law safeguards afforded by the requirement of proof of causation insure fairness because they protect defendants from the imposition of liability premised upon mere speculation and conjecture:

> "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that *there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.*" Prosser, *supra*, § 41 at 236. (Emphasis added)
>
> "[The plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id.* at 241. (Footnotes omitted.)

The California Supreme Court has chosen to forsake these policy considerations and safeguards on the notion that it is "reasonable" to establish causation by the joinder

of a substantial share of a given market where identification of the responsible party is not now possible.* In actuality, however, this does not represent an appropriate substitute for causation, and falls far short of satisfying the requirements of due process.

The position of the California Supreme Court is that its new rule of liability may be imposed because of the presumed fact that defendants are better able to bear the cost of injury than plaintiffs and that it has developed procedural devices and standards to accomplish this goal in a just and fair fashion. (App. A, p. 26)

Once the plaintiff has brought before the court manufacturers which in the aggregate produced a "substantial" share of DES, the court indulges in the presumption that each and every defendant manufactured the drug ingested by plaintiff's mother. (App. A, p. 25). A major error surrounding the presumption is patent – the presence of other manufacturers in the action does not make it more likely that a defendant produced the drug taken by a particular mother. As pointed out by Justice Richardson in dissent, the use of market share evidence "does not implicate *any* particular defendant." (App. A, p. 32).

* The Court admitted, as defendants contended, that under traditional product liability theories, there was no rational basis to connect the plaintiff's injury to any one named defendant.

> "[S]ince any one of 200 companies which manufactured DES might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.
>
> "These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether." App. A, p. 13.

Defendants before the court might consist of Manufacturer A with 40% of the market, Manufacturer B with 4% of the market, and Manufacturer C with 0.4% of the market. Since even plaintiffs would not dispute that the statistical correlation between DES exposure and clear cell adenocarcinoma does not exceed 1.4 per 1,000, there is no way to determine whether sales by the 4% or 0.4% market share defendants might have resulted in any injuries whatsoever. A's presence does not in any way increase the likelihood that either B or C was the responsible manufacturer.

The court asserted that the "equity" of the presumption in which it indulges results from the assumption that once all of the cases are finally adjudicated "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products." (App. A, p. 26)* To the contrary, exactly the opposite is true and the court's goal cannot be accomplished. Moreover, the court completely ignored other factors which make the "market share" theory unreasonable and unfair.

(a) In the first place, the theory uses the "market share" concept to impose a lower rather than an upper limit on liability. The theory assesses joint and several liability against defendants in the entire amount of damages sustained, including damages attributable to market shares of absent manufacturers.** Consequently, a defendant's liability will almost always exceed its market share. As explained by Justice Richardson in dissent:

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* This case is far different, however, from other modern product liability cases which assign the risk of loss to a solvent product manufacturer because it can spread that risk in advance through higher prices or increased insurance coverage. In such a case, unlike here, since that manufacturer is called upon to pay damages only for injuries its own products caused, it is not unfair to impose that financial-ability based economic consequence on him. There, at least, the manufacturer's exposure is limited to production and distribution over which it has some control. Here, in contrast, no such primary justification exists for the classification created.

** *See, e.g., American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899 (1978).

> "... those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs' injuries despite the fact that their 'substantial' aggregate market share may be considerably less. . . ." (App. A, p. 33).

Applying the majority's theory to the hypothetical above, it is clear that A, B and C will all be liable for more than twice their market shares.

(b) The court's assertion that "equity" will be accomplished would be correct only if no plaintiff will be able to make product identification and no defendant will be able to exculpate itself. Yet that is clearly not the case, as the court itself acknowledged by providing for precisely those two contingencies.

Some plaintiffs do make product identification and some manufacturers exculpate themselves. The Court below noted that Rogers can identify and, even prior to the appeal, one defendant had exculpated itself.* The court noted that Rogers can identify the manufacturer and, even prior to the appeal, one defendant had exculpated itself. Once identification or exculpation occurs, the defendants will bear disproportionate measures of liability. This point

* In *Abel v. Eli Lilly and Co.*, Action No. 74-030-070NP filed in the Wayne County Circuit Court, Detroit, Michigan, appeal pending to the Supreme Court of Michigan, 90 out of 144 plaintiffs, according to a brief filed by their counsel on appeal, identified the manufacturer of the DES at issue. The fact that such identification was not made in that case until *after* the trial court had determined that identification was required to state a cause of action highlights another unfair result which the California court overlooked and which necessarily flows from the theory which it has espoused. Under the "market share" theory, the plaintiff has a definite incentive to suppress identification evidence or at least to be conveniently ignorant of its existence. Why should she forego the right to sue 100 companies, any of whom might satisfy a judgment, for the right to sue one company, the company which actually made the product which allegedly injured her, when that company may no longer exist or be subject to suit where she wants to sue? Prosser addressed just this situation when he pointed out that "sheer ignorance might be, the most powerful weapon of the law." Prosser, *Res Ipsa Loquitur, a Reply to Professor Carpenter*, 10 So. Calif. L. Rev. 459, 464 (1937).

is illustrated by *Sindell* and *Rogers*. If Rogers proves her mother took Lilly's product and satisfies the other elements of her case, Lilly will be required to pay 100% of her damages. If Sindell prevails at trial, Lilly will be required to pay its market share and its proportion of the shares of the several hundred absent manufacturers. For the two cases together, Lilly's exposure will greatly exceed its market share, and the exposure of other manufacturers may be more or less than their market shares depending on the shares represented by non-party manufacturers. As the number of plaintiffs who succeed in identifying the manufacturer increases, the "equity" is increasingly out of balance.

(c) The court also assumes that to achieve equity the appropriate market can now be reconstructed and will remain the same in all cases. Once again, there is no rational basis for this conclusion. The defendants' market shares will vary from case to case and the supposed "equity" arising from an averaging of results over all cases will be impossible. The initial definition of the product market will be arbitrary since DES was manufactured in at least 13 different dosages, ranging from .1 mg. to 250 mg., and was indicated and sold for many purposes other than prevention of accidents of pregnancy. (CT p. 204, 206-07). Equally arbitrary will be the definition of the geographic market. A national market would greatly distort regional sales; a California market would present distortions of its own. In *Rogers*, for example, the drug was obtained and taken in Illinois, while suit was filed in California. Finally, the court had no reason to assume, as it did, that sufficient records exist to rationally determine market shares of over 200 manufacturers, many of whom may be out of business or not otherwise subject to suit in California, based on production and sales 20 to 30 years ago. (App. A, p. 26)

(d) The Court disregarded transaction costs in its consideration of how to achieve "equity" under its theory. Prior to *Sindell*, when identification was required, a manufacturer having 10% of the market would theoretically be a defendant in at most 10% of the cases and responsible for the costs of defending only those suits. Under *Sindell*, in contrast, that same 10% manufacturer would have to defend somewhat less than 100% of the suits and absorb defense costs in all of them. The court was blind to these costs of defense and to the special burden its theory places on defendants with small market shares.

If it is assumed that defense costs in a given action range between $50,000 to $100,000, the costs of defending 100 actions would be $5,000,000 to $10,000,000. Since defendants with the smallest market shares may incur the same litigation costs as the largest, their costs of defense may dwarf their liability exposure. The repetition of such costs will progressively cripple the smaller companies producing multi-source drugs, thereby reducing competition, and will continually drain the resources available to the larger companies for research and development of new drugs.

(e) The theory's supposed "equity" further depends on the assumption that the defendant manufacturers are in a better position than plaintiffs to bear the cost of injury and to insure against it. (App. A, p. 23) It is highly questionable, however, whether the pharmaceutical industry, and particularly its smaller firms, can withstand the extraordinary random liability imposed by the new theory. *See*, Coggins, *Industry-Wide Liability*, 13 Suffolk L. Rev. 980, 1003-06 (1979). Even before this decision, the pharmaceutical industry was virtually uninsurable. Commerce Department, *Interagency Task Force on Product Liability: Final Report of the Insurance Study*, Volume 1 at 2-4, 2-5 (January 1977). The "market share" theory is likely to render manufacturers of generic drugs totally uninsurable,

since the insurer cannot determine the scope of the exposure if it may be liable for damages and litigation costs resulting from products manufactured by companies other than its insured.

(f) The "market share" theory further assumes that litigation is an effective mechanism for compensating persons for drug-induced injuries. The opposite is true. Apart from the excessive transaction costs exacted by the *Sindell* formula, drug litigation remains a slow, costly, inefficient process for compensation. Not only do substantial delays occur between injury and payment; but plaintiffs also face uncertainties of proof, the necessity of proving defect and high litigation expenses. It has been estimated that it currently costs 77 cents to deliver 65 cents to a plaintiff in normal products liability suits. Kinsley, *Fate and Lawsuits*, 182 The New Republic, 20, 21 (June 14, 1980). *See also*, Commerce Department, *Interagency Task Force Report on Product Liability, Final Report of the Insurance Study*, Volume 1 at 2-4, 2-5 (January 1977). The Court below has arbitrarily legislated a remedy which almost certainly will increase the delivery costs per case to as much as $3 per dollar of potential recovery.* *Kinsley, supra*, at p. 21. In contrast, alternate means for assisting persons injured by drugs, including private health insurance and public health care programs,** appear vastly preferable to a radical, extraordinarily expensive restructuring of tort law. The California legislature itself has enacted a far-

* For example, with 100 defendant and cross-defendant manufacturers, 300 trial days will be added if each takes only three days to try the market share issues. At a time when the public is becoming increasingly dissatisfied with our courts, it is unwise from any perspective to create new mass litigation concepts which entail crippling costs to the litigants–and ultimately to the public–and huge delays to others who wish to utilize the limited resources of the courts.

** *Source Book of Health Insurance Data*, 1976-77, p. 21. The *Source Book* reports that at the end of 1975, private health insurance protected more than 80% of the civilian noninstitutionalized population, and that of persons under age 65, nearly 9 out of 10 were covered. *Id.*

reaching and exemplary health care services program covering both the indigent and many individuals with means of support.* Moreover, as the dissent below points out, the problem here "invites a legislative rather than an attempted judicial solution." (App. A, p. 38)

(g) The type of evidentiary hearing which the theory will permit in allowing defendants to rebut the presumption violates procedural due process. The theory seemingly preserves a degree of fairness to defendants in one respect – it allows them to offer certain types of exculpatory evidence. The appearance of procedural fairness disappears, however, upon review of other types of exculpatory evidence which the theory necessarily excludes.

As to defendants which can offer direct proof they did not manufacture the specific drug taken by plaintiff's mother, the presumption of causation may be overcome. (App. A, p. 25) If evidence establishes that a white tablet was taken, a defendant may exculpate itself by proof it manufactured only green tablets. Other direct evidence includes proof that plaintiff's mother obtained the drug at a pharmacy which did not sell a particular defendant's products. Those defendants with direct proof should be able to secure summary judgment.

All defendants remaining at trial, however, will be manufacturers lacking direct proof. As to those defendants, the "market share" theory necessarily bars the use of relevant and admissible statistical and market share evidence to overcome the presumption.** (Student comment, p. 995.) The supposed "equity" of the apportionment scheme falls

* *See*, California Welfare and Institutions Code, Sections 14000, *et seq.*, and Sections 11152 and 11153.7 (benefits payable for qualified persons with residential realty without value limitation up to $25,000 in income-producing realty). The California legislature also has been considering major reforms in products liability law and enacted, on July 31, 1980, special legislation to assist in identification and screening of persons exposed to DES. (*See* App. A, p. 38)

** Equal protection of the laws has also been violated in that some defendants may use relevant exculpatory evidence while others are barred from using equally relevant, albeit circumstantial, exculpatory

of its own weight when such evidence is excluded. For example, a manufacturer which believes it has less than 1% of a given market would ordinarily present evidence of its market share as proof of exculpation. The Student comment acknowledges that failure to bar such evidence could result in one manufacturer with a sufficient market share being held liable for 100% of the liability in all cases. (Student comment, p. 995.) As to defendants without direct proof, the presumption cannot be overcome and consequently the theory bars a fair hearing on the issue of causation.

The unfairness of the Court's procedure is exacerbated by the fact that it permits a plaintiff to use market share data in showing that she has sued manufacturers comprising a "substantial share" of the relevant market, but precludes defendants from using that same data to exculpate themselves.

The "market share" theory does not offer a principled basis for barring any defendants from use of statistical and market share evidence to overcome the presumption of causation. The theory bars defendants from the right to a fair hearing and fair rules of procedure and evidence in violation of procedural due process. Due process protects a defendant's fundamental right to rational rules of procedure and evidence. *Jenkins* v. *McKeithen*, 395 U.S. 411, 429 (1969). In *Jenkins*, the Court stressed that due process

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evidence. Moreover, on the issue of causation, defendants in this case are treated differently from defendants in all other tort cases.

Equal protection prohibits the states from treating similarly situated persons or business enterprises in different ways. *Reed v. Reed*, 404 U.S. 71 (1971); *Smith v. Cahoon*, 283 U.S. 553 (1931); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902). The singling out of a particular class of individuals and barring it from the right to a fair hearing violates equal protection notwithstanding a state's interest in increasing the speed and efficiency of adjudication. *Stanley v. Illinois*, 405 U.S. 645, 648, 656 (1972). *See also, Carrington v. Rash*, 380 U.S. 89 (1965); *Dunn v. Blumstein*, 405 U.S. 330, 349-352 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

protects the right to present evidence: "[T]he right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause."

(h) The "equity" of the California court's "market share" theory is not achieved by the supposed relief it proposes of according defendants the right to bring in through third-party actions unnamed manufacturers. By making the named defendants liable for 100% of the plaintiff's damages, those defendants, in attempting to equate liability with market share, must seek to bring in every other manufacturer. This will necessarily result in a trial which is not only an unmanageable spectacle, but which, because it will involve over 100 or possibly over 200 defendants, will deprive those defendants of any possibility of a fair hearing.* Surely, due process cannot countenance a trial where the courtroom (or, more likely, an amphitheater) is bursting with counsel for 200 corporate defendants, their clients, a plaintiff with serious injuries, her counsel, witnesses, a judge, court personnel and spectators. The chances of a jury being able to render a fair and impartial verdict when confronted with such a spectacle are so remote as to be nonexistent.

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* Literally hundreds of suits (some of them, like *Sindell* and *Rogers*, purporting to be class actions) involving DES claims are pending. Several suits in California contain well over 150 pharmaceutical manufacturers as defendants in an effort by plaintiffs themselves to hurdle the manufacturer identification issue. (*Carol Trevallee v. Abbott Laboratories, et al.*, San Francisco Superior Court Case No. 721204; *Judy K. Benny v. Abbott Laboratories, et al.*, Alameda Superior Court Case No. 525322-5; *Cindy Bocian v. Abbott Laboratories, et al.*, San Francisco Superior Court Case No. 760532.) This sideshow aspect has been addressed in separate context:

> "As a practical matter the capacities of even the best judges and jurors to absorb the factual situation presented are finite and the capacity of a courthouse does not begin to reach that of a coliseum. A class action in the instant case would stretch the facilities and abilities of this Court beyond their elastic limit." *Hettinger v. Glass Specialty Co.*, 59 F.R.D. 286, 294 (N.D. Ill. 1973).

The Fourteenth Amendment's guarantee of due process extends to state action, both legislative and judicial. *American Railway Exp. Co. v. Kentucky*, 273 U.S. 269 (1927); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922); *Vlandis v. Kline*, 412 U.S. 441 (1973). *See also, Moore v. East Cleveland*, 431 U.S. 494, 502 (1977); *NAACP v. Alabama*, 377 U.S. 288, 308 (1964).

Although states have certain leeway in creating presumptions through proper legislative classifications, conclusive presumptions as to an essential element of a cause of action or defense, unless universally true, deprive persons of the opportunity to be heard on an individual basis and thus violate procedural due process.

*See, e.g., Bell v. Burson*, 402 U.S. 535 (1971); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Due process requires a meaningful opportunity to present evidence and to be heard. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Saunders v. Shaw*, 244 U.S. 317 (1917). Substance, not form, is examined to determine whether constitutional minimums have been honored. *Bell v. Burson, supra*, 402 U.S. at 541; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Petitioners have demonstrated by example that the California decision is, first, not reasonably calculated to achieve its stated goals, second, inequitable in the extreme, and third, will deprive defendants of any opportunity for a fair trial. Procedural due process requires that these criteria be met. The decision below falls far short of satisfying them and is, therefore, constitutionally invalid.

### 3. THE JUDGMENT BELOW IS PREEMPTED BY THE SUPREMACY CLAUSE BECAUSE IT FRUSTRATES FEDERAL POLICIES GOVERNING THE DEVELOPMENT AND MARKETING OF PRESCRIPTION DRUGS, AND IN PARTICULAR THE MARKETING OF DRUGS ON A GENERIC BASIS, AND CREATES AN INVALID BURDEN ON INTERSTATE COMMERCE.

The California Supreme Court's "market share" liability theory will impose random, destructive liability and extraordinary litigation costs on manufacturers of drugs for the marketing of pharmaceuticals which are alleged to be defective 20 years after they were ingested, and after they passed the rigorous tests and standards established by the FDA. The immediate and unavoidable effect will be to drastically impede the development and marketing of new prescription drugs (in particular the marketing of drugs on a generic basis), and erect artificial barriers to entry in such markets with potential anticompetitive consequences.

The federal government strongly encourages the development and marketing of new prescription drugs and the increased price competition which results from the marketing of drugs on a generic basis.* *See Brand Names and Generic Drugs*, 1974, Hearings Before Subcommittee on Labor and Public Welfare, 93d Congress 2d Sess. (July 22,

* California likewise encourages the marketing of drugs on a generic basis. California Businesses and Professions Code, Section 4047.6. Moreover, there is a strong social interest in having more than one manufacturer of an unpatented product in any field. Society has repeatedly looked with favor upon the public policy of having multiple-manufacturers of identical products in other industries. For example, this Court in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), reversed an unfair competition order of a state court which enjoined defendant from producing a lamp identical to a lamp provided by plaintiffs. The Court recently acknowledged the public interest in having more than one manufacturer of a product, even at the expense of one company's goodwill, in the following terms:

> " 'Sharing in the good will of an article unprotected by patent or trade-mark is the exercise of a right possessed by all–and in the free exercise of which the consuming public is deeply interested.' " 376 U.S. at 231.

1974). 21 U.S.C. § 301, *et seq.* Since more diseases can be treated by drugs than by surgery or radiology, and since drugs are a relatively inexpensive mode of therapy, drug therapy is of great benefit in reducing morbidity and mortality rates as well as the costs of medical treatment. Schwartzman, *The Expected Return from Pharmaceutical Research*, 1-3 (1975). This past term, the Court reiterated the strong public policy in favor of encouraging rather than, as here, discouraging research and development in pharmaceuticals and related fields: "Mr. Justice Douglas reminded that the inventions most benefiting mankind are those that 'push back the frontiers of chemistry, physics, and the like.' *Great A. & P. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U.S. 147, 154 (1950) (concurring opinion)." *Diamond* v. *Chakrabarty*, 40 CCH S. Ct. Bull. p. B3122, B3135 (1980).

The Department of Health, Education and Welfare has commented regarding generic drugs and "branded generics":

> "About three-quarters of the drugs commonly prescribed in the United States are available only from a single source. The remaining fourth are available from multiple sources, often at widely differing prices. Historically, the lower-cost versions of multiple source drugs have been marketed by relatively small manufacturers. In recent years, however, the growing trend toward generic prescribing has encouraged major manufacturers to enter the market with so-called 'branded generics' with prices still greatly below those of the original brands. The MAC [maximum allowable cost] regulation is designed to adopt departmental policy to this increased price competition in the multiple-source market." (*Maximum Allowable Costs for Drugs*, Office of the Secretary, Department of Health, Education and Welfare (July 25, 1976)).

Any consideration of increased regulation or imposition of liability on the pharmaceutical industry must be

approached with extreme caution. Prosser, *Handbook of the Law of Torts*, 661 (4th ed. 1971); *Hearings Before the Subcommittee on Health of the Committee on Labor and Public Welfare*, 94th Congress, p. 119 (September 23, 1977). Indeed, commentators have argued that amendments to the Food, Drug, and Cosmetic Act inhibiting the introduction of new drugs have cost the American public over 300 million dollars and thousands of lives due to decreased availability of pharmaceuticals. Peltzman, *Regulation of Pharmaceutical Innovation; The 1962 Amendments* 1-3 (1974); Grabowski, *Drug Regulation and Innovation: Empirical Evidence and Policy Options* (1976). The identical concern was addressed by the Court last term in a different context. *Dawson Chem. Co. v. Rohm & Haas Co.*, 40 CCH S. Ct. Bull. p. B3850, B3895 (1980).

The "market share" theory raises a significant risk that smaller companies may be driven from the business of producing generic prescription drugs. *See*, Coggins, 13 Suffolk L. Rev. 980, 1003-1006 (1979). If a company cannot obtain insurance, investment capital is almost impossible to attract. If the company does obtain the necessary capital, gambling that it would not be the arbitrary target in litigation for injuries allegedly caused by a widely-used drug, the loss of the gamble could result in ruin. *See Reiter v. Sonotone Corp.*, 579 F.2d 1077, 1086 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979). A further anticompetitive effect is the development of barriers to entry by new firms. The existence of a high fixed cost (such as provision for "market share" liability and litigation expense) will bar a new firm from entering the industry unless it has sufficient capital or sales revenue to absorb the cost. A limitation on new entry is an important precondition for the emergence and maintenance of monopoly power. Under the antitrust laws, mergers have been forbidden where, among other matters, they would contribute to the development of such entry barriers. *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

The court's decision impermissibly interferes with federal objectives relating to the development and marketing of prescription drugs and avoidance of anticompetitive effects on interstate commerce in such markets. The Supremacy Clause voids a state's statutory or decisional law if it would retard, impede, burden or otherwise frustrate the full effectiveness of federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942). Regardless of the court's purpose in adopting the "market share" liability theory, its decision stands as a major obstacle to the accomplishment of Congressional objectives in regulating the drug industry and encouraging the unfettered marketing of drugs on a generic basis. The decision is therefore invalid under the Supremacy Clause. *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

The court's decision is also preempted because it creates an invalid burden on interestate commerce, and burdens commerce without resort to less burdensome alternatives. The purpose of the Commerce Clause was, of course, to "prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign." *Di Santo v. Pennsylvania*, 273 U.S. 34, 43-44 (1927) (Stone, J., dissenting).

At the very least, the "market share" liability theory will significantly raise the cost of generic drugs,* if not destroy the market. Under a balancing test, cost increases are an important factor, especially where economic justification for the challenged rule is slight. *See, Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Raymond Motor*

* Nor will cost increases be limited to California. The Robinson-Patman Act would bar pharmaceutical companies from engaging in price discrimination between the states. 15 U.S.C. § 13, *et seq.*

*Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). In addition, the theory will cause manufacturers to avoid economic risks by emphasizing the distribution of older, established pharmaceuticals. The effect of such policy will be to decrease the variety of pharmaceuticals available, particularly those more recently developed, and the impact of the policy will be felt nationally.

Even when a state can justify the establishment of rules which burden interstate commerce, the rules still are invalid if less burdensome alternatives exist. *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In adopting the "market share" liability theory, the court failed to consider less burdensome alternatives; instead it selected the most punitive solution of all.

## CONCLUSION

For the foregoing resaons, a Writ of Certiorari should issue, and the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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# APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

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L.A. 31063

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JUDITH SINDELL,

*Plaintiff and Appellant,*

v.

ABBOTT LABORATORIES et al.,

*Defendants and Respondents.*

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MAUREEN ROGERS,

*Plaintiff and Appellant,*

v.

REXALL DRUG COMPANY et al.,

*Defendants and Respondents.*

This case involves a complex problem both timely and significant: may a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

Plaintiff Judith Sindell brought an action against eleven drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The complaint alleges as follows:

**SEE DISSENTING OPINION**

Between 1941 and 1971, defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbesterol (DES), a drug which is a synthetic compound of the female hormone estrogen. The drug was administered to plaintiff's mother and the mothers of the class she represents,[1] for the purpose of preventing miscarriage. In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.

DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years. It is a fast-spreading and deadly disease, and radical surgery is required to prevent it from spreading. DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.

1. The plaintiff class alleged consists of "girls and woman who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers" to which they were exposed. Defendants are also sued as representatives of a class of drug manufacturers which sold DES after 1941.

In 1971, the Food and Drug Administration ordered defendants to cease marketing and promoting DES for the purpose of preventing miscarriages, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children.

During the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger.[2]

Because of defendants' advertised assurances that DES was safe and effective to prevent miscarriage, plaintiff was exposed to the drug prior to her birth. She became aware of the danger from such exposure within one year of the time she filed her complaint. As a result of the DES ingested by her mother, plaintiff developed a malignant bladder tumor which was removed by surgery. She suffers from adenosis and must constantly be monitored by biopsy or colposcopy to insure early warning of further malignancy.

The first cause of action alleges that defendants were jointly and individually negligent in that they manufactured, marketed and promoted DES as a safe and efficacious

2. It is alleged also that defendants failed to determine if there was any means to avoid or treat the effects of DES upon the daughters of women exposed to it during pregnancy, and failed to monitor the carcinogenic effects of the drug.

drug to prevent miscarriage, without adequate testing or warning, and without monitoring or reporting its effects.

A separate cause of action alleges that defendants are jointly liable regardless of which particular brand of DES was ingested by plaintiff's mother because defendants collaborated in marketing, promoting and testing the drug, relied upon each other's tests, and adhered to an industry-wide safety standard. DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product; defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock.

Other causes of action are based upon theories of strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy and "lack of consent."

Each cause of action alleges that defendants are jointly liable because they acted in concert, on the basis of express and implied agreements, and in reliance upon and ratification and exploitation of each other's testing and marketing methods.

Plaintiff seeks compensatory damages of $1 million and punitive damages of $10 million for herself. For the members of her class, she prays for equitable relief in the form of an order that defendants warn physicians and others of the danger of DES and the necessity of performing certain tests to determine the presence of disease caused by the drug, and that they establish free clinics in California to perform such tests.

Defendants demurred to the complaint. While the complaint did not expressly allege that plaintiff could not identify the manufacturer of the precise drug ingested by her

mother, she stated in her points and authorities in opposition to the demurrers filed by some of the defendants that she was unable to make the identification, and the trial court sustained the demurrers of these defendants without leave to amend on the ground that plaintiff did not and stated she could not identify which defendant had manufactured the drug responsible for her injuries. Thereupon, the court dismissed the action.[3] This appeal involves only five of ten defendants named in the complaint.[4]

Plaintiff Maureen Rogers filed a complaint containing allegations generally similar to those made by Sindell. She seeks compensatory and punitive damages on her own

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3. There are minor variations in the procedures employed as to the various defendants. Thus, for example, Eli Lilly and Company filed a motion for summary judgment, or alternatively judgment on the pleadings, rather than a demurrer; the court treated the motion as a demurrer.

The Demurrer of Abbot Laboratories, the first defendant to file a demurrer and the first to secure a dismissal, was sustained with leave to amend on the ground that plaintiff had failed to allege that a product manufactured by Abbott had caused her injuries (as opposed to the reason given by the trial court for sustaining the demurrers of the other defendants that plaintiff expressly stated that she could not identify a particular manufacturer). Upon plaintiff's failure to amend the complaint, the action was dismissed as to Abbott. A few days after the dismissal, plaintiff stated in a brief in opposition to the demurrers filed by defendants other than Abbott that she could not make the identification.

Abbott asserts that as to it the issue we consider on appeal is not properly raised because plaintiff's statement that she could not identify the manufacturer was not made until after the action had been dismissed as to Abbott. This contention is without merit. Plaintiff's failure to amend her complaint after Abbott's demurrer was sustained with leave to amend was based upon her inability to identify a specific manufacturer. Clearly, Abbott interpreted the complaint in this fashion, for it moved for dismissal on the ground that the complaint alleges that plaintiff "does not know the identity of the drug ... ingested" by her mother. Thus, Abbott may not now claim that the complaint is insufficient to raise the issue involved in this appeal.

The trial court did not determine other issues raised by the complaint, such as whether the case was properly brought as a class action.

4. Abbott Laboratories, Eli Lilly and Company, E. R. Squibb and Sons, The Upjohn Company, and Rexall Drug Company are respondents. The action was dismissed or the appeal abandoned on various grounds as to other defendants named in the complaint; e.g., one defendant demonstrated it had not manufactured DES during the period plaintiff's mother took the drug.

behalf, and on behalf of a class described in substantially the same terms as in Sindell's complaint, as well as equitable relief comparable to that sought by Sindell. The trial court sustained demurrers of E. R. Squibb & Sons, The Upjohn Company, and Rexall Drug Company.[5] Subsequent to the dismissal of her action against these defendants, Rogers amended the complaint to allege that Eli Lilly and Company, one of the defendants named in her complaint, had manufactured the drug used by their mother. Although Sindell's action and the present case have been consolidated on appeal, much of the discussion which follows will apply to Rogers only if she does not succeed in establishing that Eli Lilly and Company manufactured the DES taken by her mother. "Plaintiff" as used in this opinion refers to Sindell, and we discuss only the allegations of Sindell's complaint.

This case is but one of a number filed throughout the country seeking to hold drug manufacturers liable for injuries allegedly resulting from DES prescribed to the plaintiffs' mothers 1947.[6] According to a note in the Fordham Law Review, estimates of the number of women who took the drug during pregnancy range from 1½ million to 3 million. Hundreds, perhaps thousands, of the daughters of these women suffer from adenocarcinoma, and the incidence of vaginal adenosis among them is 30 to 90 percent. (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 Fordham L.Rev. 963, 964-967 [hereafter Fordham Comment].) Most of the cases are still pending. With two exceptions,[7] those that have been decided resulted

5. While the trial court did not specify the ground upon which the demurrers were sustained, the points and authorities filed by the parties emphasized the failure of Rogers to identify a particular manufacturer as the source of her injuries, and we may assume for the purpose of this appeal that this was the basis of the court's order.

6. DES was marketed under many different trade names.

7. In a recent New York case a jury found in the plaintiff's favor in spite of her inability to identify a specific manufacturer of DES. An appeal is pending. (*Bichler* v. *Eli Lilly and Co.* (Sup.Ct.N.Y. 1979).) A Michigan appellate court recently held that plaintiffs had stated a

in judgments in favor of the drug company defendants because of the failure of the plaintiffs to identify the manufacturer of the DES prescribed to their mothers.[8] The same result was reached in a recent California case. (*McCreery* v. *Eli Lilly & Co.* (1978) 87 Cal.App.3d 77, 84-93.) The present action is another attempt to overcome this obstacle to recovery.

We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. The rule applies whether the injury resulted from an accidental event (e.g., *Shunk* v. *Bosworth* (6th Cir. 1964) 334 F.2d 309) or from the use of a defective product. (E.g., *Wetzel* v. *Eaton Corporation* (D.Minn. 19730 62 F.R.D. 22, 29-30; *Garcia* v. *Joseph Vince Co. (1978) 84* Cal.App.3d 868, 873-875; and see annot. collection of cases in 51 A.L.R.3d 1344, 1351; 1 Hursh and Bailey, American Law of Products Liability 2d (1974) p. 125)

There are, however, exceptions to this rule. Plaintiff's complaint suggests several bases upon which defendants may be held liable for her injuries even though she cannot demonstrate the name of the manufacturer which produced the DES actually taken by her mother. The first of these theories, classically illustrated by *Summers* v. *Tice* (1948) 33 Cal.2d 80, places the burden of proof of causation upon tortious defendants in certain circumstances. The second basis of liability emerging from the complaint is that defendants acted in concert to cause injury to plaintiff. There is a third and novel approach to the problem, sometimes called the theory of "enterprise liability," but which

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cause of action against several manufacturers of DES even though identification could not be made. (*Abel* v. *Eli Lilly and Co.* (decided Dec. 5, 1979) Docket No. 60497.) That decision is on appeal to the Supreme Court of Michigan.

8. E.g., *Gray* v. *United States* (s. D. Texas 1978) 445 F.Supp. 337. In their briefs, defendants refer to a number of other cases in which trial courts have dismissed actions in DES cases on the ground stated above.

we prefer to designate by the more accurate term of "industry-wide" liability,[9] which might obviate the necessity for identifying the manufacturer of the injury-causing drug. We shall conclude that these doctrines, as previously interpreted, may not be applied to hold defendants liable under the allegations of this complaint. However, we shall propose and adopt a fourth basis for permitting the action to be tried, grounded upon an extension of the *Summers* doctrine.

## I

Plaintiff places primary reliance upon cases which hold that if a party cannot identify which of two or more defendants caused an injury, the burden of proof may shift to the defendants to show that they were not responsible for the harm. This principle is sometimes referred to as the "alternative liability" theory.

The celebrated case of Summers v. Tice, supra, 33 Cal.2d 80, a unanimous opinion of this court, best exemplifies the rule. In *Summers,* the plaintiff was injured when two hunters negligently shot in his direction. It could not be determined which of them had fired the shot which actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. We reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. In these circumstances, we held, the burden of proof shifted to the defendants, "each to absolve himself if he can." (*Id.,* p. 86.) We stated that under these or similar circumstances a defendant is ordinarily in a "far better position" to offer evidence

9. The term "enterprise liability" is sometimes used broadly to mean that losses caused by an enterprise should be borne by it. (Klemme Enterprise Liability (1976) 47 Colo. L.Rev. 153, 158.)

to determine whether he or another defendant caused the injury.

In *Summers,* we relied upon Ybarra v. Spangard (1944) 25 Cal.2d 486. There, the plaintiff was injured while he was unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. We held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of res ipsa loquitur, an inference of negligence arose that defendants were required to meet by explaining their conduct.[10]

The rule developed in *Summers* has been embodied in the Restatement of Torts. (Rest.2d Torts, § 433B, subsec. (3).)[11] Indeed, the *Summers* facts are used as an illustration (p. 447).

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10. Other cases cited by plaintiff for the proposition stated in *Summers* are only peripherally relevant. For example, in Ray v. Alad Corporation (1977) 19 Cal.3d 22, the plaintiff brought an action in strict liability for personal injuries sustained when he fell from a defective ladder manufactured by the defendant's predecessor corporation. We held that, although under the general rule governing corporate succession the defendant could not be held responsible, nevertheless a "special departure" from that rule was justified in the particular circumstances. The defendant had succeeded to the good will of the manufacturer of the ladder, and it could obtain insurance against the risk of liability, whereas the plaintiff would be left without redress if he could not hold the defendant liable. The question whether one corporation should, for policy reasons, be answerable for the products manufactured by its predecessor is a different issue than that we describe above.

11. Section 433B, subsection (3) of the Restatement provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused harm." The reason underlying the rule is "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." (Rest.2d Torts, § 433B, com. f, p. 446.)

Defendants assert that these principles are inapplicable here. First, they insist that a predicate to shifting the burden of proof under *Summers-Ybarra* is that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff, whereas in the present case the reverse appears.

Plaintiff does not claim that defendants are in a better position than she to identify the manufacturer of the drug taken by her mother or, indeed, that they have the ability to do so at all, but argues, rather, that *Summers* does not impose such a requirement as a condition to the shifting of the burden of proof. In this respect we believe plaintiff is correct.

In *Summers,* the circumstances of the accident themselves precluded an explanation of its cause. To be sure, *Summers* states that defendants are "[o]rdinarily . . . in a far better position to offer evidence to determine which one caused the injury" than a plaintiff (33 Cal.2d 80, at p. 86), but the decision does not determine that this "ordinary" situation was present. Neither the facts nor the language of the opinion indicate that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury. As the opinion acknowledges, it was impossible for the trial court to determine whether the shot which entered the plaintiff's eye came from the gun of one defendant or the other. Nevertheless, burden of proof was shifted to the defendants.

Here, as in *Summers,* the circumstances of the injury appear to render identification of the manufacturer of the drug ingested by plaintiff's mother impossible by either plaintiff or defendants, and it cannot reasonably be said that one is in a better position than the other to make the identification. Because many years elapsed between the

time the drug was taken and the manifestation of plaintiff's injuries she, and many other daughters of mothers who took DES, are unable to make such identification.[12] Certainly there can be no implication that plaintiff is at fault in failing to do so—the event occurred while plaintiff was *in utero*, a generation ago.[13]

On the other hand, it cannot be said with assurance that defendants have the means to make the identification. In this connection, they point out that drug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer. Nor do we conclude that the absence of evidence on this subject is due to the fault of defendants. While it is alleged that they produced a defective product with delayed effects and without adequate warnings, the difficulty or impossibility of identification results primarily from the passage of time rather than from their allegedly negligent acts of failing to provide adequate warnings. Thus Haft v. Lone Palm Hotel (1970) 3 Cal.3d 756, upon which plaintiff relies, is distinguishable.[14]

12. The trial court was not required to determine whether plaintiff had made sufficient efforts to establish identification since it concluded that her failure to do so was fatal to her claim. The court accepted at face value plaintiff's assertion that she could not make the identification, and for purposes of this appeal we make the same assumption.

13. Defendants maintain that plaintiff is in a better position than they are to identify the manufacturer because her mother might recall the name of the prescribing physician or the hospital or pharmacy where the drug originated, and might know the brand and strength of dosage, the appearance of the medication, or other details from which the manufacturer might be identified, whereas they possess none of this information. As we point out in footnote 12, we assume for purposes of this appeal that plaintiff cannot point to any particular manufacturer as the producer of the DES taken by her mother.

14. In *Haft*, a father and his young son drowned in defendants' swimming pool. There were no witnesses to the accident. Defendants were

It is important to observe, however, that while defendants do not have means superior to plaintiff to identify the maker of the precise drug taken by her mother, they may in some instances be able to prove that they did not manufacture the injury-causing substance. In the present case, for example, one of the original defendants was dismissed from the action upon proof that it did not manufacture DES until after plaintiff was born.

Thus we conclude that the fact defendants do not have greater access to information which might establish the identity of the manufacturer of the DES which injured plaintiff does not per se prevent application of the *Summers* rule.

Nevertheless, plaintiff may not prevail in her claim that the *Summers* rationale should be employed to fix the whole liability for her injuries upon defendants, at least as those principles have previously been applied.[15] There is an

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negligent in failing to provide a lifeguard, as required by law. We held that the absence of evidence of causation was a direct and foreseeable result of the defendants' negligence, and that, therefore, the burden of proof on the issue of causation was upon defendants. Plaintiff attempts to bring herself within this holding. She asserts that defendants' failure to discover or warn of the dangers of DES and to label the drug as experimental caused her mother to fail to keep records or remember the brand name of the drug prescribed to her "since she was unaware of any reason to do so for a period of 10 to 20 years." There is no proper analogy to *Haft* here. While in *Haft* the presence of a lifeguard on the scene would have provided a witness to the accident and probably prevented it, plaintiff asks us to speculate that if the DES taken by her mother had been labelled as an experimental drug, she would have recalled or recorded the name of the manufacturer and passed this information on to her daughter. It cannot be said here that the absence of evidence of causation was a "direct and foreseeable result" of defendants' failure to provide a warning label.

15. Plaintiff relies upon three older cases for the proposition that the burden of proof may be shifted to defendants to explain the cause of an accident even if less than all of them are before the court. (Benson v. Ross (Mich. 1906) 106 N.W. 1120; Moore v. Foster (Miss. 1938) 180 So. 73; Oliver v. Miles (Miss. 1927) 110 So. 666.) These cases do not relate to the shifting of the burden of proof; rather, they imposed liability upon one of two or more joint tort-feasors on the ground that they acted in concert in committing a negligent act. This theory of concerted action as a basis for defendants' liability will be discussed *infra*. In *Summers*, we stated that these cases were "straining" the concept of concerted action

important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug.[16]

Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES might have made the product which harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible.[17]

These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of

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and that the "more reasonable" basis for holding defendants jointly liable when more than one of them had committed a tort and plaintiff could not establish the identity of the party who had caused the damage was the danger that otherwise two negligent parties might be exonerated. (*Summers*, 33 Cal.2d 80, at pp. 84-85.)

16. According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted form the conduct of one of them. (Rest.2d Torts, § 433B, com. g, p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id.*, com. h, p. 446.)

17. Defendants claim further that the effect of shifting the burden of proof to them to demonstrate that they did not manufacture the DES which caused the injury would create a rebuttable presumption that one of them made the drug taken by plaintiffs' mother, and that this presumption would deny them due process because there is no rational basis for the inference.

the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.[18]

## II

The second principle upon which plaintiff relies is the so-called "concert of action" theory. Preliminarily, we briefly describe the procedure a drug manufacturer must follow before placing a drug on the market. Under federal law as it read prior to 1962, a new drug was defined as one "not generally recognized as . . . safe." (§ 102, 76 Stat. 781 (Oct. 10, 1962).) Such a substance could be marketed only if a new drug application had been filed with the Food and Drug Administration and had become "effective."[19] If the

18. Garcia v. Joseph Vince Co., supra, 84 Cal.App.3d 868, relied upon by defendants, presents a distinguishable factual situation. The plaintiff in *Garcia* was injured by a defective saber. He was unable to identify which of two manufacturers had produced the weapon because it was commingled with other sabers after the accident. In a suit against both manufacturers, the court refused to apply the *Summers* rationale on the ground that the plaintiff had not shown that either defendant had violated a duty to him. Thus in *Garcia*, only one of the two defendants was alleged to have manufactured a defective product, and the plaintiff's inability to identify which of the two was negligent resulted in a judgment for both defendants. (See also Wetzel v. Eaton, supra, 62 F.R.D. 22.) Here, by contrast, the DES manufactured by all defendants is alleged to be defective, but plaintiff is unable to demonstrate which of the defendant's supplied the precise DES which caused her injuries.

19. A new drug application became "effective" automatically if the Secretary of Health, Education and Welfare failed within a certain period of time to disapprove the application. If the agency had insufficient information to decide whether the drug was safe or had information that it was unsafe, the application was denied. (§ 505,52 Stat. 1052 (June 25, 1938).) Since 1962, affirmative approval of an application has been required before a new drug may be marketed. (21 U.S.C.A. § 355,subd. (c).)

agency determined that a product was no longer a "new drug," i.e., that it was "generally recognized as . . . safe," (21 U.S.C.A. § 321, subd. (p) (1) ) it could be manufactured by any drug company without submitting an application to the agency. According to defendants, 123 new drug applications for DES had been approved by 1952, and in that year DES was declared not to be a "new drug," thus allowing any manufacturer to produce it without prior testing and without submitting a new drug application to the Food and Drug Administration.

With this background we consider whether the complaint states a claim based upon "concert of action" among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement of Torts. The section provides, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." With respect to this doctrine, Prosser states that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [¶] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . ." (Prosser, Law of Torts (4th ed. 1971), sec. 46, p. 292.)

Plaintiff contends that her complaint states a cause of action under these principles. She alleges that defendants' wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in,

reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing methods, lack of warnings . . . and other acts or omissions . . ." and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. These allegations, plaintiff claims, state a "tacit understanding" among defendants to commit a tortious act against her.

In our view, this litany of charges is insufficient to allege a cause of action under the rules stated above. The gravamen of the charge of concert is that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques. These allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions.

The complaint charges also that defendants produce DES from a "common and mutually agreed upon formula," allowing pharmacists to treat the drug as a "fungible commodity" and to fill prescriptions from whatever brand of DES they had on hand at the time. It is difficult to understand how these allegations can form the basis of a cause of action for wrongful conduct by defendants, acting in concert. The formula for DES is a scientific constant. It is set forth in the United States Pharmacopoeia, and any manufacturer producing that drug must, with exceptions not relevant here, utilize the formula set forth in that compendium. (21 U.S.C.A. § 351, subd. (b).)

What the complaint appears to charge is defendants' parallel or imitative conduct in that they relied upon each others' testing and promotion methods. But such conduct describes a common practice in industry: a producer avails

himself of the experience and methods of others making the same or similar products. Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.

None of the cases cited by plaintiff supports a conclusion that defendants may be held liable for concerted tortious acts. They involve conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage,[20] or encouraged and assisted the person who directly caused the injuries by participating in a joint activity.[21]

Orser v. George (1967) 252 Cal.App.2d 660, upon which plaintiff primarily relies, is also distinguishable. There, three hunters negligently shot at a mudhen in decedent' direction. Two of them shot alternately with the gun which released the bullet resulting in the fatal wound, and the third, using a different gun, fired alternately at the same target, shooting in the same line of fire, perhaps acting tortiously. It was held that there was a possibility the third hunter knew the conduct of the others was tortious

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20. Weinberg Co. v. Bixby (1921) 185 Cal. 87, 103, involved a husband who was held liable with his wife for wrongful diversion of flood waters although he had given his wife title to the land upon which the outlet causing the diversion was constructed. He not only owned land affected by the flood waters, but he was his wife's agent for the purpose of reopening the outlet which caused the damage. In Meyer v. Thomas (1936) 18 Cal.App.2d 299, 305-306, both defendants participated in the conversion of a note and deed of trust.

21. In Agovino v. Kunze (1960) 181 Cal.App.2d 591, 599, a participant in a drag race was held liable for injuries to a plaintiff who collided with the car of another racer. In Loeb v. Kimmerle (1932) 215 Cal. 143, 151, a defendant who encouraged another defendant to commit an assult was held jointly liable for the plaintiff's injuries. Also see Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40.

toward the decedent and gave them substantial assistance and encouragement, and that it was also possible his conduct, separately considered, was a breach of duty toward decedent. Thus, the granting of summary judgment was reversed as to the third hunter.

The situation in *Orser* is similar to Agovino v. Kunze, supra, 181 Cal.App.2d 591, in which liability was imposed upon a participant in a drag race, rather than to the facts alleged in the present case. There is no allegation here that each defendant knew the other defendants' conduct was tortious toward plaintiff, and that they assisted and encouraged one another to inadequately test DES and to provide inadequate warnings. Indeed, it seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a tacit understanding to fail to perform an act. Thus there was no concert of action among defendants within the meaning of that doctrine.

## III

A third theory upon which plaintiff relies is the concept of industry-wide liability, or according to the terminology of the parties, "enterprise liability." This theory was suggested in Hall v. E. I. Du Pont de Nemours & Co., Inc. (E.D.N.Y. 1972) 345 F.Supp. 353. In that case, plaintiffs were 13 children injured by the explosion of blasting caps in 12 separate incidents which occurred in 10 different states between 1955 and 1959. The defendants were six blasting cap manufacturers, comprising virtually the entire blasting cap industry in the United States, and their trade association. There were, however, a number of Canadian blasting cap manufacturers which could have supplied the caps. The gravamen of the complaint was that the practice of the industry of omitting a warning on individual blasting caps and of failing to take other safety

measures created an unreasonable risk of harm, resulting in the plaintiffs' injuries. The complaint did not identify a particular manufacturer of a cap which caused a particular injury.[22]

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants. The court noted that this theory of liability applied to industries composed of a small number of units, and that what would be fair and reasonable with

22. We deliberately employ the term "suggested" to describe the effect of the *Hall* opinion because of the uncertain posture of the decision as authority. The defendants moved to dismiss the action on the ground that the plaintiffs had not stated a claim, and they also sought to sever the claims of the various plaintiffs and transfer them to the district court in the place where each accident occurred. The opinion discusses various possible bases of liability, including industry-wide liability, upon the assumption that there existed a national body of state tort law. (345 F.Supp. at p. 360.) At the conclusion of its opinion, the court called for briefs on the choice-of-law issues involved in the case. In a subsequent opinion, the same court decided, after briefs had been filed on the choice-of-law question, that the plaintiffs' claims should be severed, and it transferred each one to the federal court sitting in the district where the accident occurred. (Chance v. E. I. Du Pont de Nemours & Co., Inc. (E.D.N.Y. 1974) 371 F.Supp. 439.) Thereafter, the transferred cases resulted in judgments for defendants upon various grounds unrelated to the theory of industry-wide liability. (Lehtonen v. E. I. Du Pont de Nemours & Co., Inc. (D. Mont. 1975) 389 F.Supp. 633 [failure to amend complaint within 30 days]; Davis v. E. I. Du Pont de Nemours & Co., Inc. (W.D.N.C. 1974) 400 F.Supp. 1347 [statute of limitations]; Ball v. E. I. Du Pont de Nemours & Co., Inc. (6th Cir. 1975) 519 F.2d 715 [jury verdict in favor of defendant after plaintiff identified the manufacturer of the blasting cap which caused his injuries].) The parties have not indicated the status of the remaining cases transferred.

regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of countless small producers.[23]

Plaintiff attempts to state a cause of action under the rationale of *Hall.* She alleges joint enterprise and collaboration among defendants in the production, marketing, promotion and testing of DES, and "concerted promulgation and adherence to industry-wide testing, safety, warning and efficacy standards" for the drug. We have concluded above that allegations that defendants relied upon one another's testing and promotion methods do not state a cause of action for concerted conduct to commit a tortious act. Under the theory of industry-wide liability, however, each manufacturer could be liable for all injuries caused by DES by virtue of adherence to an industry-wide standard of safety.

In the Fordham Comment, the industry-wide theory of liability is discussed and refined in the context of its applicability to actions alleging injuries resulting from DES. The author explains causation under that theory as follows, ". . . [T]he industrywide standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to plaintiff's injury." (Fordham Comment, supra, at p. 997.)

The Comment proposes seven requirements for a cause of action based upon industry-wide liability,[24] and suggests

23. In discussing strict liability, the *Hall* court mentioned the drug industry, stating, "In cases where manufacturers have more experience, more information, and more control over the risky properties of their products than do drug manufacuturers, courts have applied a broader concept of forseeability which approaches the enterprise liability rationale." (345 F.Supp. 353 at p. 370.)

24. The suggested requirements are as follows:

1. There existed an insufficient, industry-wide standard of safety as to the manufacture of the product.

that if a plaintiff proves these elements, the burden of proof of causation should be shifted to the defendants, who may exonerate themselves only by showing that their product could not have caused the injury.[25]

We decline to apply this theory in the present case. At least 200 manufacturers produced DES; *Hall*, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers. (345 F.Supp. at p. 378.) Moreover, in *Hall*, the conclusion that the defendants jointly controlled the risk was based upon allegations that they had delegated some functions relating to safely to a trade association. There are no such allegations here, and we have concluded above that plaintiff has failed to allege liability on a concert of action theory.

Equally important, the drug industry is closely regulated by the Food and Drug Administration, which

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2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct.

3. A generically similar defective product was manufactured by all the defendants.

4. Plaintiff's injury was caused by this defect.

5. Defendants owed a duty to the class of which plaintiff was a member.

6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.

7. All defendants were tortfeasors.

25. The Fordham Comment takes exception to one aspect of the theory of industry-wide liability as set forth in *Hall*, i.e., the conclusion that a plaintiff is only required to show by a preponderance of the evidence that one of the defendants manufactured the product which caused her injury. The Comment suggests that a plaintiff be required to prove by clear and convincing evidence that one of the defendants before the court was responsible and that this standard of proof would require that the plaintiff join in the action the producers of 75 or 80 percent of the DES prescribed for prevention of miscarriage. It is also suggested that the damages be apportioned among the defendants according to their share of the market for DES. (Fordham Comment, supra, 999-1000.)

actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels.[26] To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. Adherence to those standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject. (Stevens v. Parke, Davis & Co. (1973) 9 Cal.3d 51, 65.) But since the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry.[27]

## IV

If we were confined to the theories of *Summers* and *Hall,* we would be constrained to hold that the judgment must be sustained. Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California courts. There are, however, forceful arguments in favor of holding that plaintiff has a cause of action.

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26. Federal regulations may specify the type of tests a manufacturer must perform for certain drugs (21 C.F.R. § 436.206 et seq.), the type of packaging used (§ 429.10), the warnings which appear on labels (§ 369.20), and the standards to be followed in the manufacture of a drug (§ 211.22 et seq.).

27. Abel v. Eli Lilly & Company, the Michigan case referred to above which held that the plaintiffs had stated a cause of action against several manufacturers of DES even though they could not identify a particular manufacturer as the source of a particular injury (see fn. 7, *ante*), relied upon the theories of concerted action and alternative liability.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in Escola v. Coca Cola Bottling Company (1944) 24 Cal.2d 453, 467-468, recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the *Summers* rule may be necessary in a situation like that before us. (See fn. 16, *ante.*)

The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for may years played a significant role in creating the unavailability of proof.

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (24 Cal.2d p. 462; see

also Rest.2d Torts, § 402A, com. c, pp. 349-350.) The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121, 129; Beech Aircraft Corp. v. Superior Court (1976) 61 Cal.App.3d 501, 522-523.) These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.

Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted. As we have seen, an undiluted *Summers* rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case produced the offending substance and that the responsible manufacturer, not named in the action, will escape liability.

But we approach the issue of causation from a different perspective: we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and 5 or 6 other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of

producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability.[28]

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment (at p. 996), we hold only that a substantial percentage is required.

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. In the present case, as we have seen, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused

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28. The Fordham Comment explains the connection between percentage of market share and liability as follows: "[I]f X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect [footnote omitted], it is close enough so that defendants' objections on the ground of fairness lose their value." (Fordham Comment, supra, at p. 94.)

by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault (Li v. Yellow Cab Co. (1975) 13 Cal.3d 804) or partial indemnity (American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578), the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can." (33 Cal.2d at p. 88.)

We are not unmindful of the practical problems involved in defining the market and determining market share,[29] but these are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff's injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately

29. Defendants assert that there are no figures available to determine market share, that DES was provided for a number of uses other than to prevent miscarriage and it would be difficult to ascertain what proportion of the drug was used as a miscarriage preventative, and that the establishment of a time frame and area for market share would pose problems.

equivalent to the damages caused by the DES it manufactured.[30]

The judgments are reversed.

MOSK, J.

We Concur:

BIRD, C. J.
NEWMAN, J.
*WHITE, J.

30. The dissent concludes by implying the problem will disappear if the Legislature appropriates funds "for the education, identification, and screening of persons exposed to DES." While such a measure may arguably be helpful in the abstract, it does not address the issue involved here: damages for injuries which have been or will be suffered. Nor, as a principle, do we see any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California.

*Assigned by the Chairman of the Judicial Council.

SINDELL v. ABBOTT LABORATORIES

ROGERS v. REXALL DRUG CO.

L.A. 31063

**DISSENTING OPINION BY RICHARDSON, J.**

I respectfully dissent. In these consolidated cases the majority adopts a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue a generation later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiffs' injuries.

Although the majority purports to change only the required burden of proof by shifting it from plaintiffs to defendants, the effect of its holding is to guarantee that plaintiffs will prevail on the causation issue because defendants are no more capable of disproving factual causation than plaintiffs are of proving it. "Market share" liability thus represents a new high water mark in tort law. The ramifications seem almost limitless, a fact which prompted one recent commentator, in criticizing a substantially identical theory, to conclude that "Elimination of the burden of proof as to identification [of the manufacturer whose drug injured plaintiff] would impose a liability which would exceed absolute liability." (Coggins, *Industry-Wide Liability* (1979) 13 Suffolk L.Rev. 980, 998, fn. omitted; see also, pp. 1000-1001.) In my view, the majority's departure from traditional tort doctrine is unwise.

The applicable principles of causation are very well established. A leading torts scholar, Dean Prosser, has authoritatively put it this way: "An *essential* element of the plaintiff's cause of action for negligence, *of for that matter for any other tort,* is that there be some reasonable connection

between the act or omission of the defendant and the damage which the plaintiff has suffered." (Prosser, Torts (4th ed. 1971), § 41, p. 236, italics added.) With particular reference to the matter before us, and in the context of products liability, the requirement of a causation element has been recognized as equally fundamental. "It is clear that any holding that a producer, manufacturer, seller, or a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant was in some way responsible. Thus, for example, if recovery is sought from a manufacturer, *it must be shown that he actually was the manufacturer of the product which caused the injury;* . . ." (1 Hursh & Bailey, American Law of Products Liability (2d ed. 1974) § 1:41, p. 125, italics added; accord, *Prosser,* supra, § 103, at pp. 671-672; 2 Dooley, Modern Tort Law (1977) § 32.03, p. 243.) Indeed, an inability to prove this causal link between defendant's conduct and plaintiff's injury has proven fatal in prior cases brought against manufacturers of DES by persons who were situated in positions identical to those of plaintiffs herein. (See McCreery v. Eli Lilly & Co. (1978) 87 Cal.App.3d 77, 82; Gray v. United States (D. Tex. 1978) 445 F.Supp. 337, 338.)

The majority now expressly abandons the foregoing traditional requirement of some causal connection between defendants' act and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship.

According to the majority, in the present case plaintiffs have openly conceded that they are unable to identify the particular entity which manufactured the drug consumed by their mothers. In fact, plaintiffs have joined only *five* of

the approximately *two hundered* drug companies which manufactured DES. Thus, the case constitutes far more than a mere factual variant upon the theme composed in *Summers* v. *Tice* (1948) 33 Cal.2d 80, wherein plaintiff joined as codefendants the *only* two persons who could have injured him. As the majority must acknowledge, our *Summers* rule applies only to cases in which ". . . it is proved that harm has been caused to the plaintiff by . . . one of [the named defendants], but there is uncertainty as to which one has caused it, . . ." (Rest.2d Torts, § 433B, subd. (3).) In the present case, in stark contrast, it remains wholly speculative and conjectural whether *any* of the five named defendants actually caused plaintiffs' injuries.

The fact that plaintiffs cannot tie defendants to the injury-producing drug does not trouble the majority for it declares that the *Summers* requirement of proof of actual causation by a named defendant is satisfied by a joinder of those defendants who have *together* manufactured *"a substantial percentage"* of the DES which has been marketed. Notably lacking from the majority's expression of its new rule, unfortunately, is any definition or guidance as to what should constitute a "substantial" share of the relevant market. The issue is entirely open-ended and the answer, presumably, is anyone's guess.

Much more significant, however, is the consequence of this unprecedented extension of liability. Recovery is permitted from a handful of defendants *each* of whom *individually* may account for a comparatively small share of the relevant market, so long as the *aggregate* business of those who have been sued is deemed "substantial." In other words, a particular defendant may be held proportionately liable *even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries.* Plaintiffs have strikingly capsulated their reasoning by insisting ". . . that while one manufacturer's product may not have injured a particular plaintiff, we can assume that

it injured a different plaintiff and all we are talking about is a mere matching of plaintiffs and defendants." (Counsel's letter (Oct. 16, 1979) p. 3.) In adopting the foregoing rationale the majority rejects over 100 years of tort law which required that before tort liability was imposed a "matching" of defendant's conduct and plaintiff's injury was absolutely essential. Furthermore, in bestowing on plaintiffs this new largess the majority sprinkles the rain of liability upon all the joined defendants alike—those whom may be tortfeasors and those who may have had nothing at all to do with plaintiffs' injury—and an added bonus is conferred. Plaintiffs are free to pick and choose their targets.

The "market share" thesis may be paraphrased. Plaintiffs have been hurt by *someone* who made DES. Because of the lapse of time no one can prove who made it. Perhaps it was not the named defendants who made it, but they did make some. Although DES was apparently safe at the time it was used, it was subsequently proven unsafe as to some daughters of some users. Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is unavailable because the element of causation is lacking. Strike that requirement and label what remains "alternative" liability, "industry-wide" liability, or "market share" liability, proving thereby that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

The foregoing result is directly contrary to long established tort principles. Once again, in the words of Dean Prosser, the applicable rule is: "[Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *A mere possibility of such causation is not enough;* and

when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Prosser,* supra, § 41, at p. 241, italics added, fns. omitted.) Under the majority's new reasoning, however, a defendant is fair game if it happens to be engaged in a similar business and causation is *possible,* even though remote.

In passing, I note the majority's dubious use of market share data. It is perfectly proper to use such information to assist in proving, circumstantially, that a particuar defendant probably caused plaintiffs' injuries. Circumstantial evidence may be used as a basis for proving the requisite probable causation. (*Id.,* at p. 242.) The majority, however, authorizes the use of such evidence for an entirely different purpose, namely, to impose and allocate liability among multiple defendants only one of whom *may* have produced the drug which injured plaintiffs. Because this use of market share evidence does not implicate *any* particular defendant, I believe such data are entirely irrelevant and inadmissible, and that the majority errs in such use. In the absence of some statutory authority there is no legal basis for such use.

Although seeming to acknowledge that imposition of liability upon defendants who probably did not cause plaintiffs' injuries is unfair the majority justifies this inequity on the ground that "each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured." (*Ante,* p. [A-26] [maj. opn., at p. 35].) In other words, because each defendant's liability is proportionate to its market share, supposedly "each manufacturer's liability would approximate its responsibility for the injuries caused by his own products." (*Ante,* p. [A-25] [maj. opn., at p. 33].) The majority dodges the "practical problems" thereby presented, choosing to

describe them as "matters of proof." However, the difficulties, in my view, are not so easily ducked, for they relate not to evidentiary matters but to the fundamental question of liability itself.

Additionally, it is readily apparent that "market share" liability will fall unevenly and disproportionately upon those manufacturers who are amenable to suit in California. On the assumption that no other state will adopt so radical a departure from traditional tort prinicples, it may be concluded that under the majority's reasoning those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs' injuries despite the fact that their "substantial" aggregate market share may be considerably less. This undeniable fact forces the majority to concede that, "a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify." (*Ante,* p. [A-26] [maj. opn. at p. 33].) With due deference, I suggest that the complete unfairness of such a result in a case involving only five of two hundred manufacturers is readily manifest.

Furthermore, several other important policy considerations persuade me that the majority holding is both inequitable and improper. The injustice inherent in the majority's new theory of liability is compounded by the fact that plaintiffs who use it are treated far more favorably than are the plaintiffs in routine tort actions. In most tort cases plaintiff knows the identity of the person who has caused his injuries. In such a case, plaintiff, of course, has no option to seek recovery from an entire industry or a "substantial" segment thereof, but in the usual instance can recover, if at all, only from the particular defendant causing injury. Such a defendant may or may not be either solvent or amenable to process. Plaintiff in the ordinary tort case must take a chance that defendant can be reached and can respond financially. On what principle should

those plaintiffs who wholly fail to prove any causation, an essential element of the traditional tort cause of action, be rewarded by being offered both a wider selection of potential defendants and a greater opportunity for recovery?

The majority attempts to justify its new liability on the ground that defendants herein are "better able to bear the cost of injury resulting from the manufacture of a defective product." (*Ante,* p. [A-23] [maj. opn., at p. 30].) This "deep pocket" theory of liability, fastening liability on defendants presumably because they are rich, has understandable popular appeal and might be tolerable in a case disclosing substantially stronger evidence of causation than herein appears. But as a general proposition, a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem. In the absence of proof that a particular defendant caused or at least probably caused plaintiff's injuries, a defendant's ability to bear the cost thereof is no more pertinent to the underlying issue of liability than its "substantial" share of the relevant market. A system priding itself on *"equal* justice under law" does not flower when the *liability* as well as the *damage* aspect of a tort action is determined by a defendant's wealth. The inevitable consequence of such a result is to create and perpetuate two rules of law—one applicable to wealthy defendants, and another standard pertaining to defendants who are poor or who have modest means. Moreover, considerable doubts have been expressed regarding the ability of the drug industry, and especially its smaller members, to bear the substantial economic costs (from both damage awards and high insurance premiums) inherent in imposing an industry-wide liability. (see Coggins, supra, 13 Suffolk L.Rev. at pp. 1003-1006, 1010-1011.)

An important and substantial countervailing public policy in defendants' favor was very recently expressed in a similar DES case, McCreery v. Eli Lilly & Co., supra, 87

Cal.App.3d 77, 86-87. Although the majority herein impliedly rejects the appellate court's holding, in my opinion pertinent language of the *McCreery* court, based upon the Restatement of Torts and bearing on the majority's "market share" theory, is well worth repeating: "Application of the comments to the Restatement Second of Torts, section 402A, to this situation compels a rejection of the imposition of liability. As the comment states, '. . . It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again, with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.' (Rest.2d Torts, § 402A, com. k.) *This section implicitly recognizes the social policy behind the development of new pharmaceutical preparations.* As one commentator states, '[t]he social and economic benefits from mobilizing the industry's resources in the war against disease and in reducing the costs of medical care are potentially enormous. The development of new drugs in the last three decades has already resulted in great social benefits. The potential gains from further advances remain large. To risk such gains is unwise. Our major objective should be to encourage a continued high level of industry investment in pharmaceutical R&D [research and development].' (Schwartzman, The Expected Return from Pharmaceutical Research: Sources of New Drugs and the Profitability of R&D Investment (1975) P. 54.)" (McCreery v. Eli Lilly & Co., supra,

87 Cal.App.3d 77, 86-87, italics added; see also Coggins, supra, 13 Suffolk L.Rev. at p. 1004.)

In the present case the majority imposes liability more than 20 years after ingestion of drugs which at the time they were used, after careful testing, had the full approval of the United States Food and Drug Administration. It seems to me that liability in the manner created by the majority must inevitably inhibit, if not the research or development, at least the dissemination of new pharmaceutical drugs. Such a result, as explained by the Restatement, is wholly inconsistent with traditional tort theory.

I also suggest that imposition of so sweeping a liability may well prove to be extremely shortsighted from the standpoint of broad social policy. Who is to say whether, and at what time and in what form, the drug industry upon which the majority now fastens this blanket liability, may develop a miracle drug critical to the diagnosis, treatment, or, indeed, cure of the very disease in question? It is counterproductive to inflict civil damages upon *all* manufacturers for the side effects and medical complications which surface in the children of the users a generation after ingestion of the drugs, particularly when, at the time of their use, the drugs met every fair test and medical standard then available and applicable. Such a result requires of the pharmaceutical industry a foresight, prescience and anticipation far beyond the most exacting standards of the relevant scientific disciplines. In effect, the majority requires the pharmaceutical research laboratory to install a piece of new equipment-the psychic's crystal ball.

I am not unmindful of the serious medical consequences of plaintiffs' injuries, and the equally serious implication to the class which she purports to represent. In balancing the various policy considerations, however, I also observe that the incidence of vaginal cancer among "DES daughters" has been variously estimated at one-tenth of 1 percent to

four-tenths of 1 percent. (13 Suffolk L.Rev., Supra, p. 999, fn. 92.) These facts raise some penetrating questions. Ninety-nine plus percent of "DES daughters' have never developed cancer. Must a drug manufacturer to escape this blanket liability wait for a generation of testing before it may disseminate drugs? If a drug has beneficial purposes for the majority of users but harmful side-effects are later revealed for a small fraction of consumers, will the manufacturer be absolutely liable? If adverse medical consequences, wholly unknown to the most careful and meticulous of present scientists, surface in *two* or *three* generations, will similar liability be imposed? In my opinon, common sense and reality combine to warn that a "market share" theory goes too far. Legally, it expects too much.

I believe that the scales of justice tip against imposition of this new liability because of the foregoing elements of unfairness to some defendants who may have had nothing whatever to do with causing any injury, the unwarranted preference created for this particular class of plaintiffs, the violence done to traditional tort principles by the drastic expansion of liability proposed, the injury threatened to the public interest in continued unrestricted basic medical research as stressed by the Restatement, and the other reasons heretofore expressed.

The majority's decision effectively makes the entire drug industry (or at least its California members) an insurer of all injuries attributable to defective drugs of uncertain or unprovable origin, including those injuries manifesting themselves a generation later, and regardless of whether particular defendants had any part whatever in causing the claimed injury. Respectfully, I think this is unreasonable overreaction for the purpose of achieving what is perceived to be a socially satisfying result.

Finally, I am disturbed by the broad and ominous ramifications of the majority's holding. The law review comment, which is the wellspring of the majority's new theory,

conceding the widespread consequences of industry-wide liability, openly acknowledges that "The DES cases are only the tip of an iceberg." (Comment, *DES and a Proposed Theory of Enterpise Liability* (1978) 46 Fordham L.Rev. 963, 1007.) Although the pharmaceutical drug industry may be the first target of this new sanction, the majority's reasoning has equally threatening application to many other areas of business and commercial activities.

Given the grave and sweeping economic, social, and medical effects of "market share" liability, the policy decision to introduce and define it should rest not with us, but with the Legislature which is currently considering not only major statutory reform of California product liability law in general, but the DES problem in particular. (See Sen. Bill No. 1392 (1979-1980 Reg. Sess.), which would establish and appropriate funds for the education, identification, and screening of persons exposed to DES, and would prohibit health care and hospital service plans from excluding or limiting coverage to persons exposed to DES.) An alternative proposal for administrative compensation, described as "a limited version of no-fault products liability" has been suggested by one commentator. (*Coggins,* supra, 13 Suffolk L.Rev. at pp. 1019-1021.) Compensation under such a plan would be awarded by an administrative tribunal from funds collected "via a tax paid by all manufacturers." (P. 1020. fn. omitted.) In any event, the problem invites a legislative rather than an attempted judicial solution.

I would affirm the judgments of dismissal.

RICHARDSON, J.

We Concur:

CLARK, J.

MANUEL, J.

# APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF
CALIFORNIA

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L.A. 31063

---

JUDITH SINDELL,
*Plaintiff, Appellant and Respondent,*
VS.
ABBOTT LABORATORIES et al.,
*Defendants, Respondents and Petitioners.*

---

MAUREEN ROGERS,
*Plaintiff, Appellant and Respondent,*
VS.
REXALL DRUG COMPANY et al.,
*Defendants, Respondents and Petitioners.*

---

# PETITION FOR REHEARING OF ELI LILLY AND COMPANY

---

After Decision by the Supreme Court of the State of California

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FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

---

Honorable Jerry Pacht, Judge

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## TABLE OF CONTENTS


| | | PAGE |
|---|---|---|
| TABLE OF AUTHORITIES CITED | | B-iii |
| I | INTRODUCTION | B-2 |
| II | THE COURT'S MARKET SHARE APPROACH WILL NOT EQUATE DAMAGES WITH THE INJURY ALLEGEDLY CAUSED BY EACH MANUFACTURER'S PRODUCT | B-3 |
| III | THE RULE OF LAW ESTABLISHED BY THE COURT IS VIOLATIVE OF LILLY'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE CALIFORNIA AND FEDERAL CONSTITUTIONS | B-8 |
| | A. Due Process Protects Lilly Against Arbitrary And Capricious Actions Of The State | B-8 |
| | B. The Element Of Causation Is Indispensable To Due Process of Law | B-9 |
| | C. The Decision Fails To Satisfy The Minimum Due Process Requirement That Actions Taken By The State Bear A Real And Substantial Relationship To A Constitutionally Permissible Objective | B-11 |
| IV | THE DECISION VIOLATES PROCEDURAL DUE PROCESS BECAUSE IT CREATES A FALSE AND IRREBUTTABLE PRESUMPTION OF CAUSATION | B-13 |
| | A. An Irrebuttable Presumption of Causation Is Created | B-13 |
| | B. The Presumption Of Causation Is False, Unreasonable And Arbitrary And Hence Unconstitutional | B-15 |

| | | PAGE |
|---|---|---|
| V | THE DECISION OF THE COURT FRUSTRATES FEDERAL LAWS AND POLICIES GOVERNING THE MARKETING OF GENERIC DRUGS, AND THEREFORE IS VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION | B-17 |
| VI | THE OPINION VIOLATES DEFENDANT'S RIGHTS TO EQUAL PROTECTION UNDER THE LAW | B-19 |
| VII | THE MARKET SHARE THEORY CREATES NUMEROUS OTHER PROBLEMS | B-21 |
| | A. The Holding Of This Court Must Be Confined To Plaintiff's Causes Of Action For Negligence | B-21 |
| | B. The Court's Proposal That All Manufacturers Of DES Cross-Complain Against Each Other Presents Enormous Problems | B-23 |
| VIII | RISK SPREADING WILL NOT BE ACHIEVED, AND THE DISASTROUS PUBLIC POLICY COSTS OF LIABILITY WILL NOT BE AVOIDED BY THE MARKET SHARE THEORY | B-24 |
| IX | CONCLUSION | B-25 |

## TABLE OF AUTHORITIES CITED

### Federal Cases


| | PAGE |
|---|---|
| *American Railway Exp. Co.* v. *Kentucky,* 273 U.S. 269, 71 L.Ed. 639 (1926) | B-9 |
| *Andrews* v. *Drew Municipal Separate School District,* 507 F.2d 611 (5th Cir. 1975) | B-15 |
| *Armstrong* v. *Manzo,* 380 U.S. 545, 14 L.Ed. 62 (1965) | B-14 |
| *Bailey* v. *Alabama,* 219 U.S. 219, 55 L.Ed. 191 (1910) | B-13 |
| *Bell* v. *Burson,* 402 U.S. 535, 29 L.Ed.2d 90 (1971) | B-14, B-15 |
| *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, 3 L.Ed.2d 1003 (1959) | B-19 |
| *Boddie* v. *Connecticut,* 401 U.S. 371, 28 L.Ed.2d 113 (1971) | B-14 |
| *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 39 L.Ed.2d 52 (1974) | B-14, B-15 |
| *Ex Parte, Commonwealth of Virginia,* 100 U.S. 313, 25 L.Ed. 667 (1880) | B-9 |
| *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 15 L.Ed.2d 447 (1966) | B-8 |
| *Goldberg* v. *Kelly,* 397 U.S. 254, 25 L.Ed.2d 287 (1970) | B-14 |
| *Hawes* v. *Georgia,* 258 U.S. 1, 66 L.Ed. 431 (1922) | B-15 |
| *Haymes* v. *Regan,* 525 F.2d 540 (2d Cir. 1975) | B-9 |
| *Hollenbaugh* v. *Carnegie Free Library,* 436 F.Supp. 1328 (W.D. Pa. 1977), *aff'd,* 578 F.2d 1374, *cert. denied,* 99 S.Ct. 734 | B-15 |
| *Leary* v. *United States,* 395 U.S. 6, 23 L.Ed.2d 57 (1969) | B-16 |
| *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 31 L.Ed.2d 424 (1972) | B-11 |

PAGE

*Martin* v. *Harrah Independent Sch. Dist.*, 579 F.2d 1192 (10th Cir. 1978), reversed on other grounds, ____ U.S. ____, 59 L.Ed.2d 248 (1979) ..... B-9

*McCulloch* v. *Maryland*, 4 Wheat 316 (1819) ..... B-18

*McFarland* v. *American Sugar Ref. Co.*, 241 U.S. 79, 60 L.Ed. 899 (1916) ..... B-15, B-16

*Moore* v. *East Cleveland*, 431 U.S. 494, 52 L.Ed.2d 531 (1977) ..... B-12

*NAACP* v. *Alabama*, 377 U.S. 288, 12 L.Ed.2d 325 (1964) ..... B-9

*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964) ..... B-9

*Perez* v. *Campbell*, 402 U.S. 637, 29 L.Ed.2d 233 (1971) ..... B-18

*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 66 L.Ed. 1045 (1921) ..... B-9

*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 3 L.Ed.2d 775 (1959) ..... B-18

*Shelley* v. *Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948) B-9

*Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 87 L.Ed. 165 (1942) ..... B-18, B-19

*Solesbee* v. *Balkcom*, 339 U.S. 9, 94 L.Ed. 604 (1950) B-16

*Speiser* v. *Randall*, 357 U.S. 513, 2 L.Ed.2d 1460 (1958) ..... B-10, B-13

*Stanley* v. *Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972) ..... B-14

*State* v. *A/S Nye Kristianborg*, 84 F.Supp. 775 (D.C. Md. 1949) ..... B-11, B-12

*U.S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 37 L.Ed.2d 767 (1973) ..... B-15

*Vlandis* v. *Kline*, 412 U.S. 441, 37 L.Ed.2d 63 (1973) B-14

*Western & A. R. Co.* v. *Henderson*, 279 U.S. 639, 73 L.Ed. 884 (1928) ..... B-14

*Wolff* v. *McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935 (1974) ..... B-9

## California Cases

PAGE

*Department of Mental Hygiene* v. *Kirchner,* 60 Cal.2d 716, 36 Cal.Rptr. 488 (1964), *cert. granted* and vacated, 380 U.S. 194 (1964), on remand, 62 Cal.2d 586, 43 Cal.Rptr. 329 (1965) ..... B-20

*Durham* v. *City of Los Angeles,* 91 Cal.App.3d 567, 154 Cal.Rptr. 243 (1979) ..... B-19

*Fogo* v. *Cutter Laboratories, Inc.,* 68 Cal.App.3d 744, 137 Cal.Rptr. 417 (1977) ..... B-22

*Hall* v. *Department of Adoptions,* 47 Cal.App.3d 898, 121 Cal.Rptr. 233 (1975) ..... B-22

*Hauter* v. *Zogarts,* 14 Cal.3d 104, 120 Cal.Rptr. 681 (1975) ..... B-21

*Hills Trans. Co.* v. *Southwest Forest Industries, Inc.,* 266 Cal.App.2d 702, 72 Cal.Rptr. 441 (1968) ..... B-22

*Holmes Packaging Mach. Corp.* v. *Bingham,* 252 Cal.App.2d 862, 60 Cal.Rptr. 769 (1967) ..... B-22

*Johnson* v. *Goodyear Mining Co.,* 127 Cal. 4 (1889) B-8

*People* v. *Collins,* 68 Cal.2d 319, 66 Cal.Rptr. 497 (1968) ..... B-10

*Peter W.* v. *San Francisco Unified Sch. Dist.,* 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976) ..... B-22

*Sail'er Inn, Inc.* v. *Kirby,* 5 Cal.3d 1, 95 Cal.Rptr. 329 (1971) ..... B-18

*Scafidi* v. *Western Loan & Bldg. Co.,* 72 Cal.App.2d 550 (1946) ..... B-22

## Constitutions

*California Constitution*

Article I, Section 7 ..... B-8, B-13

Article IV, Section 16 ..... B-19

Article VI, Section 2 ..... B-18

*United States Constitution*

Fourteenth Amendment ..... B-8, B-13

**Statutes**


| | PAGE |
|---|---|
| Cal. U. Com. Code § 2313 | B-21 |
| Cal. U. Com. Code § 2315 | B-22 |
| 21 U.S.C. §§ 301 *et seq.* | B-18 |


**Texts**


| | |
|---|---|
| BAJI 9.50 (6th ed. 1977) | B-21 |
| BAJI 9.55 (6th ed. 1977) | B-22 |
| BAJI 12.31 (6th ed. 1977) | B-22 |
| Prosser, *The Law of Torts,* § 41 (4th ed. 1971) | B-10 |
| Tribe, *American Constitutional Law,* § 10-15 (1978) | B-18 |
| 3 Witkin, *California Procedure* Pleading, §§ 573-574 (2d ed. 1971) | B-22 |

IN THE

SUPREME COURT OF

THE STATE OF CALIFORNIA

---

L.A. No. 31063

---

JUDITH SINDELL,

*Plaintiff, Appellant and Respondent,*

VS.

ABBOTT LABORATORIES, et al.,

*Defendants, Respondents and Petitioners.*

---

MAUREEN ROGERS,

*Plaintiff, Appellant and Respondent,*

VS.

REXALL DRUG COMPANY, et al.,

*Defendants, Respondents and Petitioners.*

---

**PETITION FOR REHEARING OF ELI LILLY AND COMPANY**

---

TO CHIEF JUSTICE BIRD, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

---

Respondent Eli Lilly and Company petitions for a rehearing to reconsider the decision filed in this Court on March 20, 1980, on the following grounds:

# I

## INTRODUCTION

The Court's March 20, 1980 opinion in this case carefully and thoughtfully analyzes existing theories of liability asserted by Plaintiff and concludes that none will suffice. Desiring, however, to supply some remedy, the Court proceeds to create a new doctrine where proof of causation is replaced by proof of market share.

The justification for the new rule is explained at page 32 of the opinion. Acknowledging that it would be unfair to hold pharmaceutical manufacturers liable for injuries their products did not cause, the Court accepts the "rough justice" proposal advocated in the Fordham Law Review Comment that the market share approach avoids that vice. It is asserted that if a manufacturer is held liable for the percentage of damages in each case that represents its market share percentage, the net result will roughly equal the amount of injury actually caused by that manufacturer's product.

In fact, however, this conclusion is premised on a series of assumptions which, upon close analysis, prove to be untrue. Moreover, Defendants will never be given an opportunity to disprove many of these assumptions in the underlying case, as they are not elements of Plaintiff's cause of action, or of any defense.

Together with other aspects of the opinion, serious constitutional questions are accordingly raised.

We therefore urge the Court to reexamine part IV of its opinion, and after consideration of the objections posed herein, to reject the proposed rough justice market share approach and affirm the judgment of the court below.

## II

## THE COURT'S MARKET SHARE APPROACH WILL NOT EQUATE DAMAGES WITH THE INJURY ALLEGEDLY CAUSED BY EACH MANUFACTURER'S PRODUCT

The Court holds that if Plaintiff joins the manufacturers of a "substantial share of the DES which her mother might have taken," she need not prove that her injuries were caused by the product of any particular defendant. The Court, however, declines to define, or even provide any guidance, on what would qualify as a substantial share. The Court further declines to address the problem of defining "the market" and determining market share. The probable result is that the "market" will be defined differently in every case.

In some cases, the "market" will be nationwide sales of all companies. In other cases, it will be asserted that the market is limited to a specific geographic region ranging from one particular pharmacy to a county or state. In still others, a plaintiff's mother may recall that she took a green tablet, and only a few manufacturers made green DES tablets. Certainly, plaintiff, and all manufacturers who did not make green tablets, will argue in those cases that the market is limited to green DES tablets.

Another difference is whether market share is determined by the quantity of the drug sold or by some other measure. If quantity is the test, is dosage size considered? Plaintiff does not claim that the incidence of cancer is related to the amount of DES ingested. Thus, a 5 mg. dose would have the same alleged causative effect as a 25 mg. dose and market share should be determined by the number of doses, not by the gross amount of the drug sold. Trial courts, however, may use any of several measures depending on, for example, the amount of information available in that particular case. Certainly, it would be highly

unlikely if every trial court adopted the same measure for determining market share.

The Fordham Comment equality argument, however, assumes a single market definition that will be applied in all cases. Absent such a single national market,[1] there can be no equation of "market share" with the amount of injury allegedly caused by any one manufacturer's drug.

For example, assume that Company X is a defendant in four DES cases in different California cities, and that Company X has 15% of the nationwide market for DES sold for prevention of accidents of pregnancy. In California, however, that company may have 20% of sales for that purpose. But in Northern California, Company X achieved 40% of the market. Moreover, in one Northern California case, the pharmacy involved carried only DES made by Company X and two other companies who are out of business. Thus, assuming a $100,000 judgment in each case and that 100% of the market were represented, the differing market share approaches would result in the following allocation of damages to Company X:

Case 1: Nationwide market 15% or $15,000

Case 2: California market 20% or $20,000

Case 3: Northern California market 40% or $40,000

Case 4: One Pharmacy 100% or $100,000

Total: $175,000 or nearly 44%.

Unless the Northern California market is adjusted to exclude the single pharmacy case where X pays 100% of the damages, X pays a far higher percentage of the overall damages than its market share would justify. The same is true for each of the other categories. For example, X may have only 2% of the San Diego market, but if a California

1. A California market will not suffice since the DES in some cases was taken in other states. *Rogers* is one such case.

market is used in that case, X pays 20% which largely reflects its Northern California sales for which it already paid.

Additional distortions will occur when the market is defined by limiting the product as, for example, when the plaintiff's mother recalls taking a green tablet. When these market definitions are superimposed on differing geographical market definitions, no manufacturer of DES would pay a percentage of the total damages that approximates the percentage of alleged injury caused by its product. Some will pay much less and some will pay much more. Obviously, there is no parity unless a single definition of a national market is used in each case.

An even more fatal flaw in the Fordham Comment's claim of parity is that it asssumes that nearly 100% of the market will always be represented. Even with cross-complaints, it is dubious that anything close to a 90% representation of any market, will ever be achieved. Thus, in the previous example, if 60% of the national market, 70% of the California market and 80% of the Northern California market are represented, and if there is joint and several liability, Company X ends up paying 50% of the total damage, even though it has only 15% of the nationwide market.[2]

Further, the Fordham Comment analysis assumes that identification of a particular manufacturer will never be made. As the *Rogers* and *Abel*[3] cases demonstrate, that

2. We assume that if there is joint and several liability, the liability portion attributable to absent manufacturers will be borne by the defendants in proportion to their shares. Thus, if A has 10% of the market, B has 20% and C has 30%, A will pay one-sixth, B will pay one-third and C will pay one-half of the judgment. We also assume for purposes of this analysis that market share data is available. In fact, however, such data is not available and almost all market share determinations will be based largely, if not entirely, upon speculation.

3. *Abel v. Eli Lilly and Co.*, appeal pending to the Michigan Supreme Court. In that case, 62 out of 144 plaintiffs made the identification. Four identified Lilly, 53 identified White Laboratories, four identified Squibb and one identified S. J. Tutag.

assumption is incorrect. In cases where an identification is made, of course, the company identified would pay 100% of the damages. Some companies, however, are more identifiable than others. For example, those that made green tablets, or one company which made an orange tablet, are more likely to be identified since the plaintiff's mother may remember taking those distinctive tablets as opposed to women who took white tablets. These companies may thus be identified in a disproportionate number of cases, thus seriously distorting the total amount of damages they must pay. Such companies would pay a percentage of the damages in all non-identification cases based on their market share *plus* 100% of the damages in all cases where they are identified. Unless the market in non-identification cases is adjusted for the number of identifications, the percentage of damages assessed against those companies would be grossly disproportionate to their market share, however measured.

Still another unsupportable assumption which is necessary to the "fairness" supposed by the Fordham Comment is that all DES trials in the nation must be tried by the same standards and have the same outcome. If some defendants win while others lose, if some plaintiffs carry their burden while others do not, an equitable correlation between damages paid and market share will become a complete myth.[4]

Other distortions will occur because not all "DES' daughters" will sue, and because the value of cases varies widely in different geographic areas. A case in Los Angeles may result in a verict of $500,000 while a case with an identical injury in Eureka may result in a verdict of $100,000. If a particular company happens to be identified in the Los Angeles case, as Lilly was in *Rogers,* a serious distortion

4. Similarly, it is probable that not every state in the nation will join in this Court's proposed revision of prescription drug law. If so, California sellers and manufacturers will bear a disproportionately large share of the loss. Businesses will be rewarded for not subjecting themselves to the juridsiction of California courts by only selling elsewhere, regardless of their market share.

occurs in the total amount of damages that company must pay.

The Fordham parity contention also ignores the cost of defending these cases. A company with 2% of the market would, if identification were made, be required to defend a single case or no case at all.[5] The cost of defending a single case may be only $100,000, but the cost of defending all 100 plus cases would exceed $10,000,000. Indeed, in a case with only 50 cross-complainants, the cost would be many times $100,000 per company due to the number of parties involved. The fifty defendants and cross-defendants would require at least 150 court days to try the allocation issues alone, plus at least 30 court days for the case in chief. The cost of the trial time alone would thus exceed $180,000 per company per case. Many of the smaller companies may not survive.

In sum, the essential premise upon which the market share theory rests is indisputably invalid. Unless a single national market definition is used in each case, unless that market is adjusted for cases where an identification is made, unless the same amount of damages for similar injuries is imposed, unless all cases are lost, and unless disproportionate costs of defense are eliminated, the market share theory is fundamentally unjust. Since the required adjustments cannot be made, the new theory should in fairness be reanalyzed and the judgment of the trial court affirmed.

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5. Each dose of DES did not produce an injury. Even under Plaintiff's contentions, less than 1% of the persons who were exposed to DES develop cancer. There is no way to determine if the 2% of sales by such a company resulted in any injury.

## III

## THE RULE OF LAW ESTABLISHED BY THE COURT IS VIOLATIVE OF LILLY'S SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE CALIFORNIA AND FEDERAL CONSTITUTIONS

The judicially established rule of tort law announced in this case expressly abandons the traditional requirements of causation, and instead fastens tort liability on the Defendants solely on the basis of their membership in an industry which manufactured a drug that, although carefully tested and fully approved by the United State Food and Drug Administration, allegedly caused injury to the Plaintiff twenty years after it was ingested. The Court's creation of "market share" liability so radically contravenes pre-existing rules and policies of tort law, which were expressly designed to ensure fundamental fairness to defendants, as to invoke the protective force of the due process clauses of the California and United States Constitutions.[6]

### A. Due Process Protects Lilly Against Arbitrary And Capricious Actions Of The State.

The guarantee of due process imposes clear constitutional limits on the power of the state to deprive a citizen of his rights, whether relating to liberty or property.[7] *Giaccio v. Pennsylvania,* 382 U.S. 399, 402, 15 L.Ed.2d 447 (1966). Indeed, the "touchstone" of due process is protection of the individual from the impact of arbitrary or unfair actions of

6. The mere fact that new rules of liability with devastating consequences are being retroactively applied to events that occurred more than twenty years ago is fundamentally unfair.

7. The applicable due process clauses are found in the Fourteenth Amendment of the United States Constitution and Article I Section 7 of the California Constitution. The guarantees of due process contained in the state and federal constitutions extend to the corporations. *See, e.g., Johnson v. Goodyear Mining Co.,* 127 Cal. 4, 8 (1889).

the government. *Wolff v. McDonnell,* 418 U.S. 539, 558, 41 L.Ed. 2d 935 (1974).

Lilly here challenges the validity of the Court's decision on substantive due process grounds precisely because it is premised upon wholly impermissible and erroneous assumptions, and as a consequence, results in an arbitrary and irrational deprivation of Lilly's liberty and property rights. Clearly, due process prohibits a capricious judicial decision grounded on impermissible considerations. *NAACP* v. *Alabama,* 377 U.S. 288, 308, 12 L.Ed.2d 325 (1964); *Haymes* v. *Regan,* 525 F.2d 540, 544 (2d Cir. 1975).[8] Accordingly, as demonstrated *infra,* the rule of market share liability just articulated cannot withstand constitutional scrutiny.

### B. The Element Of Causation Is Indispensable To Due Process Of Law

The foundational source of due process stems "from our American ideal of fairness. . . ." *Martin v. Harrah Independent Sch. Dist.,* 579 F.2d 1192, 1197 (10th Cir. 1978) (reversed on other grounds, ___ U.S.___, 59 L.Ed.2d 248 (1979)). In tort law, the element of causation ensures this basic notion of fairness because it serves to protect defendants from imposition of liability premised upon mere speculation and conjecture. As Dean Prosser has explained:

> An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant

8. Judicial decisions by state courts are subject to the restraints of due process (*see, American Railway Exp. Co. v. Kentucky,* 273 U.S. 269, 71 L.Ed. 639 (1926); *Prudential Ins. Co. v. Cheek,* 259 U.S. 530, 66 L.Ed. 1045 (1921)), since judicial action taken by a state court is certainly state action. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 11 L.Ed.2d 686 (1964); *Shelley v. Kraemer,* 334 U.S. 1, 14, 92 L.Ed. 1161 (1948); *Ex Parte, Commonwealth of Virginia,* 100 U.S. 313, 318, 25 L.Ed. 667 (1880).

> and the damage which the plaintiff has suffered. Prosser, *The Law of Torts,* § 41 at 236 (4th ed. 1971). (Emphasis added.)

Dean Prosser further explains that:

> [The plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibity of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. *Id.* at 241. (Footnotes omitted.)

The Court is apparently willing to forsake these policy considerations on the grounds that it is "reasonable" to establish causation by the joinder of the manufacturers of a substantial share of DES. In actuality, however, market share is not an appropriate substitute for causation, and does not satisfy due process principles of fairness. A basic fallacy underlying the Court's analysis is that while joinder of manufacturers of a substantial share of the market may result in the imposition of liability on defendants who in the *aggregate* could have caused plaintiff's injuries, as to each *individual* defendant, liability would be imposed even though mathematically it is highly unlikely that the particular defendant caused plaintiff's injuries.

Certainly imposition of criminal liability based upon such an empirically speculative relationship would not satisfy due process requirements. *See, Speiser* v. *Randall,* 357 U.S. 513, 523-524, 2 L.Ed.2d 1460 (1958); *People* v. *Collins,* 68 Cal.2d 319, 66 Cal.Rptr. 497 (1968). It is strongly urged that due process also prohibits reliance upon such a tenuous relationship as the basis of establishing civil liability. At

the very least, every individual defendant is entitled to a demonstration that there be a reasonable probability that his act or omission caused the plaintiff's injuries before he is held to answer for a claim for money damages. The Court's opinion, however, requires only the barest possibility of causation before liability attaches.

### C. The Decision Fails To Satisfy The Minimum Due Process Requirement That Actions Taken By The State Bear A Real And Substantial Relationship To A Constitutionally Permissible Objective

The effect of the Court's decision is to take the property of one pharmaceutical manufacturer to pay the liability of another. This redistribution of assets results in an impairment of Lilly's fundamental property rights, and clearly calls into play exacting constitutional scrutiny. *State* v. *A/S Nye Kristianborg,* 84 F.Supp. 775, 780 (D.C. Md. 1949). The United States Supreme Court has said with respect to constitutionally protected property rights that:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic* civil rights has long been recognized. *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 552, 31 L.Ed.2d 424 (1972). (Emphasis added.)

Accordingly, these rights which are explicitly guaranteed by the due process clause, "require particularly careful

scrutiny of the state needs asserted to justify their abridgement. [Citation.]" *Moore* v. *East Cleveland,* 431 U.S. 494, 539, 52 L.Ed.2d 531 (1977).

The objectives sought by the Court in formulating its new rule of law are two-fold: (1) it seeks to establish a reasonable basis for imposing liability for Plaintiff's injuries, even in the absence of evidence demonstrating causation; and (2) it attempts to apportion damages among drug manufacturers fairly. However, it may empirically be demonstrated that the Court's premise of "market share" bears not even a rational relationship to either of these objectives. Rather, the proposed rule which

> . . . would impair a property right, by subjecting one's property to the claims of another, without personal fault or legal liability of the owner, destroys vested rights of property, and is therefore clearly invalid. It is a taking of property without due process of law contrary to the 14th Amendment of the Federal Constitution. . . . *State v. A/S Nye Kristianborg, supra,* 84 F.Supp. at 780.

## IV

## THE DECISION VIOLATES PROCEDURAL DUE PROCESS BECAUSE IT CREATES A FALSE AND IRREBUTABLE PRESUMPTION OF CAUSATION

The opinion states that if a plaintiff joins a "substantial share" of DES manufacturers, she need not prove that her injury was caused by any of them. This doctrine constitutes an arbitrary, irrational conclusive presumption of causation and thereby violates the Defendants' procedural due process rights guaranteed by Article I, Section 7, of the California Constitution and the Fourteenth Amendment of the United States Constitution.

### A. An Irrebuttable Presumption Of Causation Is Created

As stated in *Bailey v. Alabama,* 219 U.S. 219, 239, 55 L.Ed. 191 (1910), "the power to create presumptions is not a means of escape from constitutional restrictions." There are limits beyond which courts and legislatures are not permitted to shift burdens of proof. *Speiser v. Randall, supra,* 357 U.S. at 523; *Bailey v. Alabama, supra,* 219 U.S. 239. In *Speiser* the Court notes:

> It is of course within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' (Citation omitted.) 'Of course the legislature may go a good way in raising . . . [presumptions] or in changing the burden of proof, but there are limits. . . .' [T]his Court has struck down state statutes unfairly shifting the burden of proof. *Speiser v. Randall, supra,* 357 U.S. 523-524, 2 L.Ed.2d 1471.

Hence, the shift of the burden of proof created by the opinion at issue must satisfy due process criteria.

It is well-established that irrebuttable presumptions are disfavored under the due process clause of the Fourteenth Amendment. *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 644, 39 L.Ed.2d 52 (1974); *Vlandis v. Kline*, 412 U.S. 441, 446, 37 L.Ed.2d 63 (1973). This follows from the fact that such presumptions have the effect of depriving persons of the opportunity to be treated on an individual basis, rather than as members of a group. *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972) (Court held that the State could not conclusively presume that any particular unmarried father was unfit to raise his children; due process required a more individualized determination.)

As noted by one constitutional law scholar, at the core of the procedural due process rights is the guarantee that an opportunity to be heard be accorded to individuals whose interests in life, liberty or property will be adversely affected by governmental action. *See*, Tribe, *American Constitutional Law*, § 10-15, at 550-551 (1978). Governmental action which creates presumptions and which operates to deny a "fair" opportunity to repel such presumptions are violative of due process. *Western & A.R. Co. v. Henderson*, 279 U.S. 639, 642, 73 L.Ed. 884 (1928). Due process requires a *meaningful* opportunity to be heard [*Bell v. Burson*, 402 U.S. 535, 542, 29 L.Ed.2d 90 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L.Ed.2d 113 (1971); *Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287 (1970); Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62 (1965)] which must "be protected against denial of particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut, supra,* 401 U.S. at 379-380.

Defendants in this case certainly have no "meaningful" or "fair" opportunity to refute the presumption of causation since as the opinion on pages 13-15 expressly concedes:

> [I]t cannot reasonably be said that one [plaintiff or defendant] is in a better position than the other to make the identification. . . . [I]t cannot be said with assurance that defendants have the means to make the identification.

The fact the DES manufacturers may legally have an "opportunity" to present rebuttal evidence is not determinative since the Court is well aware of Defendants' inability in this regard. *Bell v. Burson, supra,* 402 U.S. at 541. (Substance, not form is examined to determine whether constitutional minimums have been honored.) Indeed, in several DES cases the plaintiffs are refusing to supply any information about the drug their mothers took on the basis of a physician-patient privilege.

Accordingly, we respectfully submit that the effect of the Court's opinion is to create an arbitrary and conclusive presumption which violates Defendants' due process rights.

### B. The Presumption of Causation Is False, Unreasonable And Arbitrary And Hence Unconstitutional

Presumptions must be "universally true in fact" in order to be valid and not violative of the due process clause. *Cleveland Board of Education* v. *La Fleur, supra,* 414 U.S. 644 (citing *Vlandis* v. *Kline, supra,* 412 U.S. at 452); *see, U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514, 37 L.Ed.2d 767 (1973). As one court recently declared, the presumed fact must *necessarily* follow the proven fact. *Hollenbaugh* v. *Carnegie Free Library,* 436 F.Supp. 1328, 1332 (W.D. Pa. 1977), *aff'd,* 578 f.2d 1374, *cert. denied,* 99 S.Ct. 734 (citing *Andrews* v. *Drew Municipal Separate School District,* 507 F.2d 611, 614 (5th Cir. 1975).)[9] Unreasonable, arbitrary and

9. Unreasonable, arbitrary and irrational presumptions violate due process. *Hawkes* v. *Georgia,* 258 U.S. 1, 4, 66 L.ED. 431 (1922); *McFarland* v. *American Sugar Ref. Co.,* 79, 86, 60 L.ED. 899 (1916). In *Leary*

irrational presumptions violate due process. *Hawes* v. *Georgia,* 258 U.S. 1, 4, 66 L.Ed. 431 (1922); *McFarland* v. *American Sugar Ref. Co.,* 241 U.S. 79, 86, 60 L.Ed. 899 (1916).

As previously demonstrated, the Fordham Comment's assumption that under the proposed rule each DES manufacturer's share of the damages will approximate its responsibility for the injuries caused by its own products, has absolutely no basis in fact or reason and is hence unconstitutional.

The presumption created by the Court does not create a mere inference of causation which will vanish upon the introduction of any opposing evidence. On the contrary, each Defendant will be required to conclusively prove its innocence before being released of liability. The opinion states:

> Each defendant will be held liable for the proportion of the judgment represented by its share of that market *unless it demonstrates that it could not have made the product* which caused plaintiff's injuries. Opinion at page 33.

By effectively eliminating the element of causation upon which all tort law is based, the proposed rule violates the procedural due process rights of the Defendants. As stated in *Solesbee* v. *Balkcom,* 339 U.S. 9, 16, 94 L.Ed. 604 (1950) (Frankfurter, dissenting):

> [T]he Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

---

v. *United States,* 395 U.S. 6, 36, 23 L.Ed.2d 57 (1969), the court held that a presumption:

> must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

This Court recognizes that absent rough equality between the percentage of damages assessed against any particular manufacturer of DES, and the percentage of injury caused by that manufacturer's product, imposition of liability without proof of causation is fundamentally unfair. Since the rule proposed does not, and cannot, achieve the required equality, it becomes fundamentally unfair and thus violative of due process.

## V

## THE DECISION OF THE COURT FRUSTRATES FEDERAL LAWS AND POLICIES GOVERNING THE MARKETING OF GENERIC DRUGS, AND THEREFORE IS VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

The decision here at issue in effect imposes random liability for the marketing of drugs which are alleged to be defective 20 years after they were ingested, and after they passed the rigorous tests and standards established by the FDA. The certain effect is to drastically impede the marketing of generic drugs, and impact the development of new drugs. The Court's decision is thus unconstitutional on preemption grounds since the decision represents an impermissible interference with the federal objective of insuring and safe-guarding the public's health. As the dissent correctly observed, the decision will severely restrict the development and marketing of life-saving drugs. Specifically, Justice Richardson noted:

> It is counterproductive to inflict civil damages upon *all* manufacturers for the side effects and medical complications which surface in the children of the users a generation after ingestion of the drugs, particularly when, at the time of their use, the drugs met every fair test and medical standard then available and applicable. Such a result requires of the pharmaceutical industry a foresight, prescience

> and anticipation far beyond the most exacting standards of the relevant scientific disciplines. (Slip Option at 14-15)

The clear intent of Congress in regulating the field of prescription drugs is to ensure and safeguard the public's health. The federal government has sought to carefully regulate the marketing of new, potentially life-saving drugs, while at the same time encouraging their development. 21 U.S.C. §§ 301 *et. seq.*

It is equally clear that a State's statutory or decisional law is void under the supremacy clause (Article VI, Section 2) if it would retard, impede, burden or otherwise frustrate the full effectiveness of federal law. *McCulloch* v. *Maryland,* 4 Wheat 316 (1819); *Sola Elec. Co.* v. *Jefferson Elec. Co.,* 317 U.S. 173, 87 L.Ed. 165 (1942); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal.3d 1, 10, 95 Cal.Rptr. 329 (1971). It matters not that the court's purpose—to compensate plaintiffs unable to identify allegedly offending drug companies—is valid; the effect of the decision stands as an obstacle to the accomplishment of the objectives of Congress in regulating the drug industry. As the United States Supreme Court has said:

> [T]he controlling principle [is] that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the supremacy clause. *Perez* v. *Campbell, supra,* 402 U.S. at 652.

Thus, in *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 3 L.Ed.2d 775 (1959), The United States Supreme Court reversed the judgment of this Court which had awarded damages for union activities which this Court held constituted a tort based on unfair labor practices under state law. In so holding, the United States Supreme Court found that the California courts had no jurisdiction over union activities which were clearly subject only to federal regulation. *Id.* at 246. The Court concluded that:

> The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy. *Id.*

In the instant case, the court's decision similarily conflicts with federal regulation of prescription drugs by creating a serious impediment to the Congressional objective of encouraging the marketing of new and generic drugs, an important national health goal. Prescription drugs are different from ordinary consumer products. The unique position of prescription drugs requires that tort liability rules not impact federal objectives for national health care. Accordingly, the decision is beyond the jurisdiction of this court, and invalid on constitutional grounds. *Sola Elec. Co.* v. *Jefferson Elec. Co., supra,* 317 U.S. at 176.[10]

## VI

## THE OPINION VIOLATES DEFENDANTS' RIGHTS TO EQUAL PROTECTION UNDER THE LAW

Article IV, Section 16, of the California Constitution mandates that all laws of a general nature have a uniform operation. The equal protection clause of the Fourteenth Amendment of the United States Constitution has been similarly construed and evokes substantially identical standards. *Durham* v. *City of Los Angeles,* 91 Cal.App.3d 567, 154 Cal.Rptr. 243 (1979).

It is indisputable that this Court has in essence created two classes of plaintiffs—(1) daughters of mothers who ingested DES and who cannot identify the DES manufacturers, and (2) all other potential and actual plaintiffs—and two classes of defendants—(1) DES

10. For the reasons advanced herein, the court's decision also raises a substantial question of violation of the commerce clause, because the effect of the decision is to unduly burden interstate commerce. *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, 3 L.Ed.2d 1003 (1959).

manufacturers and (2) all other potential and actual defendants. While drastically altering existing tort law by effectively eliminating the elelment of causation for those who are unable to identify the DES manufactureres, plaintiffs in other cases must still identify the alleged tortfeasor who caused their injuries.

Hence, a daughter of a mother who was exposed to DES has in a sense been granted an undeserved windfall, while other individuals, who may in many instances be more gravely injured, must still satisfy the causation requirement.[11]

Moreover, such special plaintiffs are benefited at the expense of DES manufacturers. The Court has singled out Producers of a generic drug and predicated liability for this class of manufacturers upon their wealth or solvency, not upon their responsibility for the injury. This Court has previously rejected attempts to recover costs based upon such a classification, and has so stated:

> It is established in this state that the mere presence of wealth or lack thereof in an individual citizen cannot be the basis for valid class discrimination. *Department of Mental Hygiene* v. *Kirchner,* 60 Cal.2d 716, 721, 36 Cal.Rptr. 488 (1964) *(cert. granted* and vacated, 380 U.S. 194 (1964), on remand, 62 Cal. 2d 586, 43 Cal.Rptr. 329 (1965)).

Altering established tort principles for the benefit of a select few plaintiffs at the expense of a few defendants is accordingly violative of Defendants' rights of equal protection under the law.

11. Even worse, the proposed rule encourages the suspension of evidence since a plaintiff who claims that she cannot identify has a wide choice of targets to sue, while the plaintiff who can identify the applicable manufacturer may sue only one defendant, who may be insolvent, or not within the jurisdiction of the forum in which plaintiff would like to sue.

## VII

## THE MARKET SHARE THEORY CREATES NUMEROUS OTHER PROBLEMS

In addition to the previously posed fundamental objections to a market share theory, other problems presented will virtually guarantee years of litigation, including the reversal of judgments necessitating the re-trial of cases which will be prohibitively expensive to try even one time. In fairness to the parties and the trial courts, these problems should be addressed by the Court at the outset.

### A. The Holding Of This Court Must Be Confined To Plaintiff's Causes Of Actions For Negligence

Although the opinion appears to undermine any attempt by Plaintiff to rely on her theories based upon joint enterprise conspiracy (*Id.* at 18-29), it is silent on the application of the market share theory with respect to Plaintiff's other causes of action. This opinion should not be read to extend to Plaintiff's theories based upon warranty and fraud. These theories depend upon proof of actionable conduct by a particular defendant.

Plaintiff's complaint purports to state causes of action for alleged breaches of express warranties (CT 15:9-14) and the implied warranty of fitness for a particular purpose (CT 16:15-21). To prevail on a theory of express warranty, Plaintiff must show a sale by a particular defendant to either her or her physician *and* express representations by that seller that became part of the "basis of the bargain" when the drug was purchased. (*Hauter* v. *Zogarts,* 14 Cal.3d 104, 114-117, 120 Cal.Rptr. 681 (1975); Cal. Com. Code § 2313; BAJI 9.50 (6th ed. 1977).) With respect to her theory based upon the implied warranty of fitness,

Plaintiff must likewise show a sale by a particular defendant *and* reliance by either her or her physician on a particular defendant's conduct during that sale. *Fogo* v. *Cutter Laboratories, Inc.,* 68 Cal.App.3d 744, 759, 137 Cal.Rptr. 417 (1977); *Holmes Packaging Mach. Corp.* v. *Bingham,* 252 Cal.App. 2d 862, 873, 60 Cal.Rptr. 769 (1967); Cal. Com. Code § 2315; BAJI 9.55 (6th ed. 1977).) Since Plaintiff has admitted that she cannot identify the particular defendant who sold the drug to which she was exposed, by definition she cannot satisfy either requirement essential to her warranty theories: (1) sale by a particular defendant; and (2) representations or conduct by that defendant during the course of the sale which allegedly caused the drug to be purchased. Plaintiff thus cannot as a matter of law meet her burden of proof on these theories and the judgment below should be sustained as to them.

A similar result is required with respect to Plaintiff's cause of action for fraud. In California, the elements of a tort cause of action for fraud are well defined and they must be specifically pled and factually supported before a plaintiff can recover. 3 Witkin, *California Procedure* Pleading §§ 573-574 at 2210-2212 (2d ed. 1971). An essential element of a fraud cause of action is an actionable misrepresentation by the defendant. *Hills Trans. Co.* v. *Southwest Forest Industries, Inc.,* 266 Cal.App.2d 702, 709, 72 Cal.Rptr. 441 (1968); *Scafidi* v. *Western Loan & Bldg. Co.,* 72 Cal.App.2d 550, 558 (1946); BAJI 12.31 (6th ed. 1977). If a defendant makes no actionable representation, he cannot be held liable for fraud. *Hall* v. *Department of Adoptions,* 47 Cal.App.3d 898, 904, 121 Cal.Rptr. 223 (1975). Similarly, if a plaintiff cannot show reliance on a specific misrepresentation made by the defendant, there can be no recovery based upon fraud. *Peter W.* v. *San Francisco Unified Sch. Dist.,* 60 Cal.App.3d 814, 827, 131 Cal.Rptr. 854 (1976); BAJI 12.31 (6th ed. 1977). Again, since Plaintiff has

acknowledged that she cannot identify the particular manufacturer who made and sold the allegedly defective drug, she cannot identify which particular defendant allegedly made any actionable misrepresentations upon which her physician allegedly relied. In the absence of her showing both an actionable misrepresentation and reliance on that misrepresentation, she cannot recover for fraud as a matter of law and the judgment below with respect to that cause of action should be sustained.

**b. The Court's Proposal that All Manufacturers Of DES Cross-Complain Against Each Other Presents Enormous Problems**

The Court suggests that the named Defendants cross-complain against other manufacturers of DES to enlarge the market share representation. It is unclear, however, what the elements of such a cause of action entail. Is it sufficient to allege only that a cross-defendant produced DES, at which point the burden of proof shifts to that cross-defendant to show that its product could not have been taken by the plaintiff? Or must the cross-complaining defendant allege and prove that the cross-defendant's DES was defective?

If the latter alternative is to be the rule, the Defendants would be in a totally unfair catch-22 situation where they would be required to plead and prove that the product was defective at the same time they are defending the product in the case in chief.

A second problem lies in the probable failure of proof on market share. Whoever has the burden of proof on this issue will usually lose. It is therfore unfair to place such a burden on the cross-complaining party. Such a rule would, in effect, permit the arbitrary selection of targets by Plaintiff that the Court sought to avoid.

In short, unless the Court is prepared to accept cross-complaints alleging only that the cross-defendant produced DES for use in accidents of pregnancy, which might have

been taken by Plaintiff's mother, such cross-complaints are unfair and unworkable.

## VIII

## RISK SPREADING WILL NOT BE ACHIEVED, AND THE DISASTROUS PUBLIC POLICY COSTS OF LIABILITY WILL NOT BE AVOIDED BY THE MARKET SHARE THEORY

The Court impliedly recognized the public policy dangers posed by application of a *Summers* v. *Tice* theory to prescription drug manufacturers, and sought to avoid those problems by the Fordham Comment's market share theory. The Court reasoned that since each such manufacturer is liable only for the percentage of damages roughly equal to the percentage of injury allegedly caused by its product, most of the potentially disastrous ramifications of such liability is avoided.

However, as earlier demonstrated, the assumptions upon which this reasoning is based fail. The Fordham Comment's market share approach will not result in rough equality between injury caused and damages assessed. To the contrary, the error factor is certain to be in excess of 30 percent. An error factor of this magnitude is not "rough equality." Nor is it just to impose liability upon the basis of a premise that simply is not correct. The Court sought "rough justice" by the market share approach, but it will search in vain. There is no justice, rough or otherwise, in that approach.

But just or not, the Court should be concerned about the consequences of the rule it proposes, for that rule does not avoid the dangers of inhibiting the introduction of new drugs, and seriously impeding generic drug marketing.

Nor will the proposed rule provide risk spreading. Since liability will fall disproportionately upon the manufacturers, neither insurance nor raising product prices will permit a distribution of that loss to other. There is accordingly very real danger that many of the smaller companies may be literally destroyed by what the Court proposes.

## IX

## CONCLUSION

This Court has obviously struggled to a fashion a new rule of law which would both provide compensation for the unavoidable injuries that occur from prescription drugs and avoid creating serious problems to society. However, we respectfully submit that the resulting rule fails to achieve its objective.

This Court's new rule of law contains the defects that inevitably flow from trying to hammer and bend adversary litigation into an instrument which can be used to attack every problem, in society.

Adversary litigation is simply not an appropriate instrument to compensate every "innocent victim" as this Court seems to suggest, and tort law cannot be expanded to provide compensation without finding a tortfeasor, as this opinion holds. Such expansion is fundamentally unfair, constitutionally impermissible, and creates horrendous costs to society that far exceed any possible benefit.

We respectfully submit that the cost to society of providing Plaintiff a tort remedy in the instant case is simply too high. The Court should leave this problem to those who have the tools to fashion an appropriate solution which satisfies Plaintiff's needs without the destructive and wasteful effects to the tort remedy proposed.

Upon reconsideration, the Court should reject the proposed drastic expansion of products law and affirm the judgment of the trial court.

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By PETER W. DAVIS
Peter W. Davis
*Attorneys for Eli Lilly and Company*

PROOF OF SERVICE BY MAIL (1013,2015.5C.C.P.)

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within action; my business address is 1939 Harrison Street, Oakland, California 94612. On April 4, 1980, I served the within Petition for Rehearing of Eli Lilly and Company in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, Alameda county, California, addressed as follows:

Please see attached list.

I declare under penalty of perjury that the above is true and correct.

Executed on April 4, 1980 at Oakland, California.

Linda S. Busk

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# APPENDIX C

C-1

IN THE

SUPREME COURT OF THE STATE
OF CALIFORNIA

---

L.A. No. 31063

---

JUDITH SINDELL,

*Plaintiff and Appellant,*

vs.

ABBOTT LABORATORIES, et al.,

*Defendants and Respondents.*

---

MAUREEN ROGERS,

*Plaintiff and Appellant,*

vs.

REXALL DRUG COMPANY, et al.,

*Defendants and Respondents.*

**JOINDER OF REXALL DRUG COMPANY IN PETITION FOR REHEARING OF ELI LILLY AND COMPANY**

---

After Decision by the Supreme Court of the State of California

From the Judgment of the Superior Court of Los Angeles County, Hon. Jerry Pacht and Hon. Robert I. Weil, Judges

And from the Judgment of the Superior Court of Ventura County, Hon. Steven J. Stone, Judge

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*Rexall Drug Company*

IN THE

SUPREME COURT OF THE STATE
OF CALIFORNIA

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L.A. No. 31063

---

JUDITH SINDELL,
*Plaintiff and Appellant,*

vs.

ABBOTT LABORATORIES, et al.,
*Defendants and Respondents.*

---

MAUREEN ROGERS,
*Plaintiff and Appellant,*

vs.

REXALL DRUG COMPANY, et al.,
*Defendants and Respondents.*

**JOINDER OF REXALL DRUG COMPANY IN PETITION FOR REHEARING OF ELI LILLY AND COMPANY**

TO: THE HONORABLE CHIEF JUSTICE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Respondent Rexall Drug Company hereby joins in the petition for rehearing filed herein by respondent Eli Lilly and Company.

Dated: April 4, 1980

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE
RICHARD C. FIELD
DAVID L. BACON

By RICHARD C. FIELD
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*Attorneys for Respondent*
*Rexall Drug Company*

## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 523 West Sixth Street, 10th Floor, Los Angeles, California 90014.

On April 4, 1980, I served the foregoing document described as JOINDER OF REXALL DRUG COMPANY IN PETITION FOR REHEARING OF ELI LILLY AND COMPANY on See Attached Rider in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

See Attached Rider

Executed on April 4, 1980, at Los Angles, California.

[x] (State) I declare under penalty of perjury that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction service was made.

HILDA CRUZ

Hilda Cruz

## RIDER TO PROOF OF SERVICE

**Sindell v. Abbott Laboratories, et al.**

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# APPENDIX D

Order Due
May 19, 1980

**ORDER DENYING REHEARING**

L.A. No. 31063

IN THE
SUPREME COURT OF THE STATE
OF CALIFORNIA IN BANK

SINDELL
v.
ABBOTT LABORATORIES

ROGERS
v.
REXALL DRUG COMPANY, ET AL.,

Tobriner, J., did not participate. White, J., sitting under assignment by the Chairperson of the Judicial Council.

*Respondents' petitions* for rehearing DENIED.

Clark, J., Richardson, J., and Manuel, J., are of the opinion that the petitions should be granted.

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 24th day of July A.D 1980.

By A. JOHNSON
*Deputy Clerk*

BIRD
*Chief Justice*

# see 80

# 157

# see 80

# 158

# see 80

# 172